

THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;
SHEWING
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;
AND
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION;

AND
THE PRACTICE
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;
PRIZE; COURT OF BANKRUPTCY; AND COURTS OF
ERROR AND APPEAL.

WITH NEW PRACTICAL FORMS.
INTENDED AS
A COURT AND CIRCUIT COMPANION.

—
IN THREE VOLUMES.

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—

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PREFACE

TO

THE FIFTH PART.

THIS and the next part will conclude my entire undertaking. They principally relate to the *Practice* of the Three *Superior* Courts of *Law*, though incidentally to much of the practice of other Courts. It would have been a vain and futile attempt to endeavour to compete with the admirable work of Mr. Tidd, (the most useful offered to the Profession since the first publication of Blackstone's Commentaries,) or that of my son, whose recent publication, with his Collection of Forms, are worthy of his assiduity and intelligence. I have therefore endeavoured to take a *different view* of the subject, by examining the *principles* on which most of the rules are founded, *conjointly with the rules themselves*, by which association the rules will be better understood and more deeply impressed upon the memory. (a)

(a) We all confess, but few adequately perceive, why it is *so difficult* to recollect a *dry rule of practice*, and we incorrectly impute to a defect of memory what in reality is attributable to our *never having adequately known* the subject; the simple truth is, that *reason or principle* is the appropriate food of the *mind*, and it follows that no position is received with adequate appetite, unless it be associated with the *reason* upon which it is founded. The *attention* is not sufficiently excited, and consequently the *perception* of the rule is imperfect, and the *image* is *so* indistinctly and faintly impressed on the memory that it is soon forgotten; but when the mind is gratified by perceiving the *reason* of a

I have also not confined my attention to the mere statement of the several modes of proceeding, but have attempted to shew which is *preferable*, and why. As an instance of the manner of treating the subjects, the reader is referred to the consideration of the mode of obtaining *instructions* to *sue* or to *defend*, discussed in page 117 to 125. The observance of the precautionary measures there recommended, would, I trust, prevent many disastrous nonsuits and insufficient defences, at present too frequently occurring, from the want of adequate attention in the earliest stages of litigation.

Numerous *precedents* will be found in the notes, some entirely new, and others with suggestions for improvement in practice. I have considered it important at least that students, if not practitioners, should have the *forms before them* at the *same time* when they are examining the *parts* and *requisites*, and therefore I have adopted this mode of printing the precedents in preference to collecting them in a separate volume.

The *Table of Contents* immediately following these observations will shew the outline of this part in analytical order, and will serve as a *temporary Index* until the concluding part has been published; and at

rule it is never forgotten, because all the powers of the mind are then duly and constantly exercised in perpetuating the full knowledge and recollection of the rule. In my Treatise on *Medical Jurisprudence*, page 322 to 333, I have attempted to explain the modes of impressing and perpetuating the knowledge of any subject by the conjoint use of all the mental faculties, but principally by enjoining to all *legal students* the paramount importance of being in full possession of the *principles* and *reasons* on which each rule is founded before they pass on to the examination of another.

the head of each Chapter will be found an analytical table of its subjects.

In the four *earliest Chapters*, subjects of *general importance* are first considered; as—*First*, The six several branch jurisdictions of each Court, and which should be resorted to; as either the Court *in Banc*, in which usually four judges preside; the *Practice Court*; the jurisdiction and practice before a *single Judge at Chambers*; the jurisdiction and practice before the *Master and Prothonotary*; the jurisdiction and practice before a Judge at *Nisi Prius*; and the new jurisdiction and practice before the *Sheriff* of each county. *Secondly*, Is fully considered the several authorities on or by which the practice of the Courts stands or is regulated, as *Statutes, Rules, Usages* and *Decisions*, with a comparative view of the different effect of each. *Thirdly*, The present altered law relating to the *Terms and Vacations*, and all regulations respecting *time*. *Fourthly*, Are stated all the advisable *preliminary steps* antecedent to the actual commencement of an action or defence.

The *fifth Chapter* states all the Parts and Requisites of *Process in general*, as founded on the Uniformity of Process Act, 2 W. 4, c. 39, and this on a plan entirely new, and which it is hoped will meet with approbation.

In the next Chapters successively *each* description of process, with its *peculiar requisites* and incidents, are *separately* examined, viz. Writs of *Summons, Distingas, Capias, Detainer, Summons* against a *Member of Parliament* when a trader, and all the incident proceedings relating to each, until appearance or bail above; and, lastly, are considered Proceedings to *Out-*

lawry and to prevent the operation of a statute of *Limitations*.

The present part has purposely been closed with the subject of process, as at present established, so as to enable the author to introduce, at the *commencement* of the *next part*, a chapter relating to the expected *New Law* and *Proceedings qualifying* the right of *Arrest*, should any enactment on that subject be passed.

Afterwards will be considered all the rest of the proceedings in an action to its conclusion, and in particular will be given a very full chapter on *Affidavits*, *Motions*, and *Rules*, and another on *Nisi Prius Briefs*, with precedents and considerations of the best modes of *arguing* the former and of *conducting the trial* of an action, as well on behalf of a plaintiff as a defendant.

Throughout this volume it will be found that I have anxiously attempted to decry the injurious policy, so degradingly adopted by some practitioners, of taking advantage of *trifling irregularities* and *unworthy objections*; and I have endeavoured to advocate, on every occasion, that course of *liberal conduct* which should ever be pursued by the members of an highly honourable and justly influential profession.

J. C.

Chambers, 6, Chancery Lane,
4th April, 1835.

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PART FIVE

CHAPTER I.

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IN the preceding parts we have not only examined the *remedies* without the aid of any Court, but also the principal preliminary considerations antecedent to an action, as the *retainer*

CHAP. I.
INTRODUCTION.
Recapitulation
of subjects of
previous in-
quiry.

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INTRODUCTION.

of an attorney, solicitor or proctor; (a) the *proper parties* to sue or be sued; (b) the differences in *causes of action*; (c) the *evidence* for or against the claim; (d) how such evidence is to be elicited, as by *bill of discovery*, &c.; (e) the propriety of an attorney's *letter* preceding the writ; (f) and of *apologies or compromises*; (g) the expediency of *offers of security* to induce a creditor to give time; (h) the necessity for and utility of *notices, tenders and demands*; (i) *demands* of inspection and copy of warrants; (k) *notices of action*; (l) *notices* of an attorney's *lien*, and prohibition to pay his client; (m) with an enumeration of the various *preferable remedies*; (n) the expediency of *retaining counsel*; (o) the remedy by *arbitration*, (p) or by *summary proceedings* before a justice of the peace by information, conviction, &c. (q) We have also in the *fourth part* examined much of the *jurisdiction and general practice* of the *fourteen principal Courts* of Law, Equity, Ecclesiastical, Admiralty, Bankruptcy, and in Error.

Subjects remaining to be considered.

We are now in this concluding part more particularly to examine the detail of the practice of all those Courts. We shall give *full* consideration only to those parts which at present appear to require most particular attention.

Subjects of this Chapter.

First, we are to inquire to what Court of Law, and to what department, branch or subdivision in particular of each, the application for redress should be sought by a plaintiff or a defendant.

Enumeration of the six branches of jurisdiction of each Court.

The different *branches of jurisdiction* of the three superior Courts of Law are, 1. That of the full Court *in Banc*; 2. Of the Practice Court (at present holden only for the Court of K. B.); 3. Of a single Judge at Chambers; 4. Of the Master or Prothonotaries; 5. Of the Judge at Nisi Prius and on the Circuit; and 6. Of the Sheriff on Trials and Inquiry, &c.

Each Court of Law is *divided* into several distinct departments or branches of jurisdiction, in aid or relief of that which is *superior*, sometimes termed the *full Court*, (or rather the Court in *banc*, for it is not essential that *all* the *four* judges should be present,) and each other branch has distinct jurisdiction in aid of the highest. The departments of each Court are principally *six, viz.* 1. The Court properly consisting of four

(a) *Ante*, vol. ii. 18.

(b) *Id.* 47, 48.

(c) *Id.* 52.

(d) *Id.* 53.

(e) *Id.* 54.

(f) *Id.* 56.

(g) *Id.* 57.

(h) *Id.* 59.

(i) *Id.* 60.

(k) *Id.* 61.

(l) *Id.* 63.

(m) *Id.* 69.

(n) *Id.* 70.

(o) *Id.* 71 and §22.

(p) *Id.* 73 to 125.

(q) *Id.* 127 to 257.

judges or four barons sitting in *banc*, and only in term time, except on trials at bar under the authority of 1 W. 4, c. 70, s. 7, and before whom most proceedings in a cause are *supposed* to take place; and before whom, *in fact*, all the *most important* parts of business are transacted; such as all *formal arguments* and *judgments* upon *demurrer*, or in *arrest of judgment*, or *after verdict*, or on special cases or special verdicts, &c.; and to whom *appeals* may sometimes be made from the proceeding of either of the inferior branch jurisdictions of the same Court, or from inferior Courts, and in King's Bench, still on writs of error *in fact* even from the judgment of the Court of Common Pleas; 2. The *Practice Court*, recently created by the 1 W. 4, c. 70, s. 1, and held before a *single judge* sitting apart from the other four *only during term*, and now holden only as a branch of the Court of *King's Bench*,) and who in an *open Court*, and upon motion and rule in the same *forms* as those theretofore used in the principal Court in *banc*, disposes of certain *less important* branches of business, and grants rules *nisi* even in some difficult cases, to be afterwards discussed before the four judges in *banc*; 3. A *judge* of each Court attending singly at his *chambers* in rotation, as well during the terms in the afternoon, as in the vacations, and who disposes of *still less important* matters connected with a suit, not by formal motion and rule, but upon *summons*, and by his *order*; or sometimes on *petition*, and sometimes (though not so frequently so as before the Practice Court was instituted) *after term*, by hearing rules *delegated* to him by the Court in consequence of the Court in *banc* not having been able to dispose of them during the term; or as being more fit for *private examination*; and sometimes even at the judge's house in the evening, so as not to interrupt or delay the judge's decision on the press of smaller matters at his chambers; 4. The *master* or prothonotary, to whom *many matters* are referred by the Court to decide upon, as in references as to the amount due on a bill of exchange, &c., or in order that, after he has examined the affidavits, and perhaps made an extended inquiry upon *further affidavits*, he may *report* the result of his investigation to the Court; as frequently occurs in the King's Bench, where the propriety of the conduct of an attorney has been questioned; 5. The jurisdiction of a judge on the circuit, who, besides the ancient jurisdiction of presiding as a judge on the trial, has several new or enlarged powers connected with the cause to be tried, and essential to remove difficulties that might otherwise then occur, such as the powers of *amendment* under

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INTRODUCTION.

3 & 4 W. 4, c. 42, s. 23; and *lastly*, the jurisdiction of the *sheriff* of each county or his deputy, as an officer of and in aid of the Court either on *trials of issues* under the same statute, when the claim for a debt or demand does not exceed *twenty pounds*, or on an inquiry of damages after a judgment by default, or in executing the process of the Court. But each of these several branch jurisdictions require further consideration than this mere summary or outline. Therefore to proceed.

First, The Jurisdiction and Practice of the Court in Banc.

I. IN BANC.

First, The jurisdiction and practice of the Court in banc, and what business must be there transacted, or may be transacted, before one of its inferior branch jurisdictions.

1. In general.

In general, and in the ordinary course of litigation, the attorney for the complainant whose *legal* right has been injured, issues, according to his own discretion, one of the several prescribed forms of *writs* against the wrong-doer out of an *appointed office*, and which writ is *signed* by an officer of the particular Court, and afterwards *impressed* with the *seal* of the Court by another appointed officer, and thereby finally receives its authenticity; and to forge or imitate the signature or seal is a high crime; and these steps are taken without the Court, or even one of its judges having any actual knowledge of the proceeding; and the Court *in banc* hears nothing of the suit until, in consequence of a demurrer or a verdict, or some irregularity, a contest between the parties has arisen which is of sufficient importance to require the *actual interference* and decision of such *Court in banc*.^(s) But in the course of the numerous actions and defences successively depending in the three Courts, there are almost innumerable intermediate *smaller practical differences* between the parties, which, although of less importance than a formal judgment or decision to be pronounced by the four judges, are nevertheless fit to be discussed and determined on motion and rule nisi, afterwards made absolute or discharged by a single judge sitting in the Practice Court; whilst other differences of *still less importance* are disposed of before a single judge at his *chambers*, in a still more summary manner upon summons and by order. The *regular* proceedings in a suit are comparatively few and simple, but by collateral circumstances of innumerable variety, and by blunders and irregularities, the proceedings not unfrequently become complex; and the whole of these are important to be known by all practi-

(s) It seems, therefore, that, as observed by Mr. Justice Taunton, there is no sufficient ground for any distinction in permitting an amendment of a writ, and not of a copy, for each is in fact the act of the plaintiff's attorney, and not of the Court; and it is not the duty even of the

officer who signs and seals the writ to see that it is formally correct, but that duty entirely falls on such attorney. Per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; but see *Byfield v. Street*, 10 Bing. 28.

ioners, since it is impossible to anticipate that they may not have to encounter some such difficulty. In the present chapter we will concisely consider what description of business must be transacted in *full Court* or rather in *banc*; what in the *Practice Court*; what before a *single judge* at *chambers* in term or vacation; what before the *master* or prothonotary; and what at *nisi prius* before a single judge; and what by or before the *sheriff*. This inquiry will clear the ground, and enable us in the next chapter to consider *upon what authority*, grounds or rules, the *practice* of the Courts proceeds or depends. We will then in the third chapter consider the differences between the *terms and vacations*, and some general rules respecting *time*; and in the fourth chapter we will examine some important *preliminaries* before the first step in the cause by issuing the *process*; and the rest of the practice will follow in natural order as it arises in the usual course of a cause.

CHAP. I.
I. IN BANC.

The number of the *judges* and *barons*(*u*) of each of the superior Courts of Law at Westminster, viz. King's Bench, Common Pleas and Exchequer, constituting the *full Court* sitting in *banc*, has varied at different times, according as it has been considered essential to exercise the prerogative unquestionably vested in the *king*,(*x*) though according to modern practice, the legislature, as in the late instance, sometimes give him express power.(*y*) Before the 23d July, 1830, each Court had attached to it for a very considerable time only *four* judges; and although the 1 W. 4, c. 70, s. 1, authorized the king to appoint a *fifth* judge in each Court, yet it is expressly provided that only *three puisne judges* shall sit in *banc* with the chief justice or chief baron, so that the *five* judges cannot sit together, or *professedly* concur in any proceeding in either of these Courts; and the number of the judges constituting the *full Court* sitting in *banc* is limited to *four*, consisting of the chief and three of the *puisne judges* or *barons* sitting in rotation, whilst the other *puisne judge* (*usually* for an *entire term*) sits apart in the *Practice Court* in the early part of the morning, and to hear and decide upon matters of less

2. What acts must be transacted before the whole Court or in *banc*.(*t*)

(*t*) And see *post* as to what a single judge cannot decide upon.

(*u*) The 1 W. 4, c. 70, s. 1, treats the terms of judge and baron as synonymous, and throughout this work the term *judge* alone will be used as including each.

(*x*) *Emerton v. Emerton*, Sir T. Raym. 475; *Dug. Orig. Jur.* c. 19; 3 Bla. Com. 41.

(*y*) 1 W. 4, c. 70, s. 1. The student will observe as a general rule, that in mo-

dern times it has been customary for the king very rarely to exercise his prerogative, but to delegate the expediency of every measure in the least affecting the public to the consideration of parliament, so that most changes have been made by statute, though the king might of his own authority have effected the object; as by his warrant alone opening the Court of Common Pleas to all barristers, *ante*, vol. ii. 385.

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I. IN BANC.

importance, under the provisions in the 1 W. 4, c. 70, s. 1 and 4, and in the afternoon he attends at chambers; and in the ensuing term another puisne judge relieves him in this subordinate though exceedingly important duty, and he then takes his seat in banc, and so on in rotation. By these means the same four judges are enabled to sit continuously from ten in the morning until four or five o'clock in the afternoon, and having during that term no chamber duty to perform, are enabled in the evenings to examine and consider the numerous demurrer-books, special cases, and special verdicts, and proceedings standing for argument (in the King's Bench as well on the civil as the criminal side of that Court,) so as to be better able to understand the arguments to be heard on the succeeding day, and are thereby enabled to devote the whole of the morning to the superior class of business.

It is not, however, essential to the validity of the proceedings in full Court that the full number of four judges or barons shall be assembled, and the 3 & 4 W. 4, c. 41, s. 6 and 25 and 26, expressly provides for the absence of the Chief Justice, or Chief Baron, or of the Chief Judge of the Court of Review, whilst attending the Judicial Committee of the Privy Council, (z) and it is expressly provided that *two* judges of the Court of Review may proceed in the absence of the chief; (z) and before the recent addition of a fifth judge in the three superior Courts of Law, it frequently happened that in the absence of the chief, as when trying causes at Nisi Prius, especially after three o'clock in the afternoon, when one of the judges had left the Court, and proceeded to chambers, many cases of importance were heard and determined by only two judges in the Court of King's Bench. In general, however, it has been considered by the judges important, not only that there should be a *full* Court during the entire *hearing* as well as in deciding upon all formal arguments on *demurrer*, rules absolute in *arrest of judgment*, rules absolute for *new trials* (when on the *merits* and not on a mere practical point), and in the King's Bench rules absolute for a *criminal information* and the *Crown paper*, including questions on *parochial settlement* and *rates*; but it is also a principle that each judge should, on all points of the least novelty or difficulty, state his opinion *seriatim*, on the ground that the suitors have a right, not only to know the determination of each judge, but also the precise reasons which have led him after due investigation and consideration to arrive at his

(z) *Ante*, vol. ii. 575.

conclusion, so as to evince that he has *really* and *energetically* applied his attention and mind to the question, and not like a mere cipher, or merely to save the labour of research, tacitly assented to what the other judges may have decided. (a) Another advantage also has *not unfrequently* arisen from this faithful discharge of a judge's duty, viz., that *not unfrequently* it has occurred that the respectful firmness and pertinacity of counsel has fixed the attention and influenced the opinion of one of the several judges, and who, after one or more of the judges has delivered an unfavourable opinion upon first impressions, has so earnestly advocated the cause of truth, as to induce such other judges to pause and delay giving their judgment conclusively, and in consequence, ultimately all the other judges have concurred in that opinion, at first entertained only by one of the judges, (b) and thus the decisions in banc of the *full Court*, faithfully reported by experienced barristers, (c)

(a) Per Bayley, B. in *Young v. Timmins*, 1 Tyr. Rep. 238. The most enlightened and experienced judge, when deciding apart from others, from want of that useful comparison of views prevailing in *banc*, will sometimes err; see an instance in *Young v. Beck*, 2 Dowl. 462, and 1 Croun. M. & R. 460. There is a ludicrous statement in verse in Burrow's Settlement Cases, 122, of the supposed then practice of the puisne judges stating their opinion in chorus, as assenting to the Chief Justice's opinion and not stating their own seriatim. Sir James Burrows there states that he had heard a report of a decision on a settlement case in the form of a catch, and which will be found there given.} And see Burn's Justice, 26 edit. tit. Poor, 313, note (a).

(b) This occurred in *Luntley v. Battine*, 2 Bar. & Ald. 234, where one of the defendant's counsel gave up the point, but the junior so pressed the argument, that he almost incurred the displeasure of the then Lord Chief Justice Ellenborough, for jejune and injudicious pertinacity; but at length Mr. Justice Bayley induced the Chief Justice to pause and hear the argument; after which, the distinguished Chief Justice, with that candour which always influences a great mind, and is indispensable in the due administration of justice, publicly avowed that he had changed his opinion, and with the other judges decided in favour of the defendant; upon which the bar, with a warmth and sincerity, negating all supposition of unworthy jealousy, congratulated the junior; and he has attributed much of his subsequent success in his profession to the result of that particular discharge of his duty.

(c) As regards *legal reports*, it has been the misfortune of the profession in some

instances to have them undertaken by inexperienced personages, who can scarcely understand the question before the Court, and still less appreciate the import of the arguments or judgment, and whose haste and misapprehension too often occasions the mistatement even of facts. It will be remembered that the late Lord Kenyon observed that the report of a case might in some respects be correct, but that in the statement of his judgment, it had been by the omission of one little word "*not*" supposed to have been in the affirmative, when in fact it was in the negative. A person should be a good lawyer to be a reporter. It is scarcely fair to a judge, and is likely to mislead the profession, to report *Nisi Prius* cases, or even the decisions of a single judge in the Practice Court, excepting on the laudible ground that one side or the other usually wants to have *some materials*, however questionable, to support a bad case, and so far *Nisi Prius* decisions and those of the Practice Court may be useful in a *desperate* case; but really three or even five reports of the same case as at present to be found are too severe a tax on the time and pocket of the profession, more especially when they as usual reiterate the similar decisions upon the same point instead of confining reports to new and important points decided in *banc*, and not unfrequently copy from a prior report. I remember the late Lord Ellenborough's declaration, "although I cannot refuse to hear such decisions and hasty dicta, when quoted by counsel, yet I wish that in every town and village in the kingdom there were an officer of justice to perform on such books the same office as was so ably executed by the curate and the barber upon Don Quixote's library."

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become landmarks, by which *each single judge afterwards considers himself bound*, (d) and the profession and suitors may afterwards steer their course. These, and a few other such essential advantages result from an investigation, whether of fact or law, before a *full Court*, that nothing but extreme necessity for delegating even a mere question of costs to a single judge, should, in the administration of justice, be admitted. But at the same time, when it is recollected that at Nisi Prius, except on trials at bar, only one judge presides, and that in Courts of Equity and Ecclesiastical, Admiralty, and Prize Courts, only one person presides as judge, even upon the most intricate and important questions, therefore suitors have not any positive right to complain when they find that for the purposes of despatch, cases of less importance are referred to a single judge. It should be constantly kept in view that it is scarcely consistent with the due and perfect administration of justice, that the judges who have to sit in banc or full Court should be frequently kept in Court to a late hour in the afternoon of each day, for it is essential that, not only in the evenings before civil and crown paper days, the judges should have full time to examine the paper books left at their chambers for perusal, but even to consult authorities, so that they may be better prepared to hear and appreciate the arguments of counsel, and it would be advantageous to the suitors of the Court, even if more time than at present were afforded to the judges for this important purpose. (e)

Before the Court of King's Bench was relieved from a part of its burthensome jurisdiction by the appointment of a fifth judge with power to sit apart and decide upon the more simple matters during the term in order to despatch business, a practice was adopted by the judges of that Court to sit in Serjeants' Inn Hall, some days previous to the commencement of Hilary, Easter, and Michaelmas Terms, there to hear special arguments on demurrers, writs of error, special verdicts, special cases, and new trials, upon which they then delivered their opinions seriatim, (except in cases reserved for further consideration,) and judgment was afterwards formally pronounced as was con-

(d) It seems that a single judge, even in the Practice Court, does not consider himself at liberty to decide against a decision in banc, on a similar point in any other of the Superior Courts, and this, although another single judge of his own Court had, on another occasion deviated from that rule, and decided differently. Per Littledale, J. in *Hilleur v. Hengate*, 3

Dowl. 61. As to the last decision being to be preferred, see *post*, Chapter II., and *Duncan v. Grant*, 4 Tyr. 819.

(e) The public know only of the labour of the judges in Court, and are ignorant of the arduous professional duties they have to perform, as it were in their library, not only during the terms as pending the sittings and circuits.

sidered essential in the following term in open Court, thereby evincing the understanding that all decisions of the Court must at least be formally pronounced in term.(f) And the statute 1 & 2 G. 4, c. 16, repealed and altered by 3 G. 4, c. 102, contained enactments expressly authorising decisions as well in criminal as civil cases at certain times in vacation.(g) But as the appointment of a fifth judge for each Court to sit apart and decide upon the less difficult descriptions of business,(h) and the enactment requiring judgment in most criminal cases to be given at the assizes instead of occupying the time of the full Court above in term time,(i) and the enactment enabling the judges, when attending the Court of Exchequer Chamber in error, to hear arguments and decide thereupon *in vacation*,(k) have greatly relieved the Courts of considerable parts of pressing jurisdiction, it became no longer necessary for the Court of King's Bench, or any other of the Superior Courts of Law, to sit in vacation for the purpose of disposing of business that by the common law ought to be disposed of in term time, and therefore the above act 3 G. 4, c. 102, was repealed by 1 W. 4, c. 70, s. 5. It is fit also that the suitors should know that in the vacation, the judges are almost incessantly occupied, either in the Exchequer Chamber, or in attending the Privy Council, or the House of Lords, or in assisting the Chancellor, or at the Old Bailey, or otherwise, so that they have scarcely time for adequate exercise or repose.

In so extensive a community as England or the United Kingdom it can rarely occur that *relationship* or other objection, usually constituting a ground of challenge to a jurymen, can exist so as to render it improper for a *judge* to act. The greatest delicacy however is constantly observed on the part of the judges, so that they never act when there could be the *possibility* of doubt whether they would be free from bias. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited; but that impediment and exclusion being found exceedingly inconvenient and an indulgence of unnecessary jealousy, was expressly altered

3. What relationship or interest precludes a judge from acting as such.

(f) *Rowe v. Roach*, 1 Maule & Sel. 304; *Evans v. Soule*, 2 Id. 1; *Thomas v. Courtney*, 1 Bar & Ald. 1; *M'Neillage v. Holloway*, Id. 218; *Wilson v. Dickson*, 2 Id. 2; *Cartwright v. Keely*, 7 Taunt. 192, Tidd, 39, 40, 9 edit.

(g) See the enactments concisely stated, Tidd, 39, 40.

(h) 1 W. 4, c. 70, s. 1.

(i) *Id.* sect. 9. See observations on the altered practice of giving judgment in criminal cases on the circuit immediately after trial, Chitty's Summary Practice, 185 to 188, and *post*.

(k) *Id.* sect. 8.

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by statutes. (l) A recent decision in the Privy Council, that a judge could not sit in that character in a cause wherein his deceased wife's nephew was interested, because the feelings of such collateral relationship are not to be considered as determining with the death of the wife, evinces that the slightest degree of relationship would induce a judge to decline interfering. (m) And the common law establishes that the *slightest degree* of pecuniary interest would be considered an insuperable objection. (n)

Consequences
of the judges
differing in
opinion.

When the judges differ in opinion the judgment or decision depends on the majority in number, without regard to any distinction between the Chief Justice or the Chief Baron; (o) though in making general rules or orders under the 1 W. 4, c. 70, s. 11, or the 3 & 4 W. 4, c. 42, s. 1, the three chiefs must concur with the majority or the rules cannot be made. If the Court should be equally divided, as two for and two against a rule or demurrer or motion in arrest of judgment or for a new trial, or judgment on verdict or other proceeding, then there can be no rule, order, or judgment; but in such a case, where considerable property is at stake, or it is otherwise important to have a decision in a Court of Error, and it is desired to take the cause into the Exchequer Chamber or House of Lords, it is usual for one of the judges to withdraw his opinion, so as to prevent an

(l) 3 Bla. Com. 271; 4 Bla. Com. 59, 60; 12 G. 2, c. 27; 49 G. 3, c. 91. But still it is exceedingly important that a judge, (when acting in such county, or indeed in any other, where he may have relations or intimate acquaintance,) should during his circuit, or whenever he is exercising his judicial functions, separate himself from their society; for although it is well known amongst honourable men that the only danger from relationship with a judge or arbitrator is that he may be inclined to decide *against* his relation for fear of regard warping his judgment, yet the vulgar will think otherwise. I know professionally that the late Mr. Justice Taunton, one of the most highly honourable and best of men, was subjected to a libel in a cause of *Blake v. Pilford*, tried on the western circuit, A.D. 1832, merely because some persons supposed to be his relations and to be also related to the defendant attended the Court during the trial and sat near the judge and, as was supposed, partook of refreshment in his ante-room.

(m) *Becquet v. Lempriere*, 1 Knapp's Rep. 376.

(n) *Matthew v. Olleston*, 4 Mod. 226; Comb. 218; Hard. 44; Hob. 87; and see

3 Bla. Com. 299, *ante*, 3d part, p. 83, as to who may be an arbitrator. On a motion for a new trial in *Dauncey v. Berkley*, T.T. 1827, Lord Tenterden and the rest of the judges granted a new trial principally on the ground that one of the special jurors who had given the plaintiff a verdict for 1000*l.* damages was also one of his assignees, although he could have no beneficial interest in the verdict, which was given in an action for criminal conversation with the plaintiff's wife, commenced after he had obtained his certificate, the Court observing that the circumstance of the juror being an assignee might constitute a bias or inclination in the plaintiff's favour, and that it was important for the administration of justice that in every department it should be free even from the breath of suspicion.

(o) See *Selby v. Bardons*, 3 Bar. & Adolp. 2, where the two puisne judges but recently appointed on correct ground differed from and consequently overruled the decision of that distinguished lawyer the deceased Lord Tenterden; a memorable instance of the uncertainty which must ever accompany legal opinions, and admirably calculated to moderate conceit in any extent of legal knowledge.

equal division and enable the two judges then constituting a majority to declare their formal judgments, by which means there may be an appeal to the highest tribunal.

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The jurisdiction of the judges is limited by statutes or express rules, or by the practice or usage of the Courts, from which they cannot deviate unless by consent of the parties or as a condition of granting some favour or permitting some act which it is discretionary in the Court to refuse; as if a defendant apply for a new trial the Court may refuse it unless he bring the sum recovered, or a part, into Court as a certain security for the result; but they could not *ex mero motu* impose such terms during an action. And the full Court in Banc could not any more than a judge give *more time* to a defendant for the payment of a debt recovered than the ordinary practice at law allows; (7) although, under the recent acts 1 W. 4, c. 7, s. 2, and 3 & 4 W. 4, c. 42, s. 18, 19, a judge, and even a sheriff, has a discretionary power to *expedite* execution immediately or soon after verdict in an action; and although under most of the Court of Request Acts the commissioners for carrying the same into execution have power to direct by what, if any instalments, a debt shall be paid, and it might perhaps be well to vest similar powers in the *superior* judges. (r)

5. Limits of the jurisdiction of the judges. (p)

Second.—The Practice Court.

II. Those who have been accustomed to attend the superior Courts of Law at Westminster, where four judges constantly preside, and who have witnessed the great advantages resulting from those four *communicating* with each other pending an argument, and comparing the *inclination* of their opinions before they are openly declared, thereby preventing the hasty statement of an opinion to which in the ordinary attachment to consistency there might be a natural but injurious inclination to adhere, will undoubtedly prefer such tribunal to that where *only one judge* presides, as in the Courts of Equity and Spiritual

II. PRACTICE COURT.

The jurisdiction of one judge in the Practice Court during the terms.

Creation and jurisdiction of the Practice Court in general.

(7) And as regards *jurisdiction* each Court is so strictly confined to its proper limits that it has been said that if the Court of King's Bench should issue a *grand cape* in a real action, and cause it to be put in force, that Court having no jurisdiction over real actions, an action of

trespass would lie; 10 Coke, 76a; 2 Bulst. 64.

(q) *Kirby v. Ellicr*, 2 Crompt. & M. 315.

(r) See an instance in 39 & 40 G. 3, c. 194, s. 5, in the Court of Requests for London, Chitty's Col. Stat. 225.

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Courts, where the most important matters are decided by such single judge. It will however be admitted that at law as well as in equity many matters very frequently arise which are not of sufficient difficulty or importance to require the united wisdom of four judges, but may be safely determined by one.^(s) Nevertheless, before the recent act, 11 G. 4 and 1 W. 4, c. 70, s. 1, it was essential that almost every matter should be determined in full Court, and the jurisdiction of one of them during the terms to sit apart was confined to the Court of King's Bench under the then existing act, ^(t) and even there was very limited and depended entirely on particular enactment; for as the Courts of Law were constituted and designed to be holden before the *four judges* of each, it was considered the *absolute right* of the suitors in *all cases* to have the decision of the four judges, unless prevented by illness from attending; and even bail could not legally have justified in chambers in term time unless by consent. ^(u) And it was even enjoined by express rule of the Court of King's Bench and Common Pleas that no business should be transacted before a judge at chambers *during the sitting* of the Courts at Westminster; ^(x) and the consequence was that in term time the judges could only transact business at chambers in term time in the *evening*, or at least during hours when the Court was not sitting. The 57 G. 3, c. 11, confined to the Court of King's Bench, was the first act for altering the practice in this respect, and after reciting "that the Court of King's Bench, by reason of the great increase of business therein, had of late been much occupied during term in the adding and justifying of special bail, *whereby other business of great public concern* had been much obstructed and delayed, and that it would tend materially to remedy that inconvenience if one of the judges of the same Court should be enabled to sit and proceed, when occasion should so require, upon the said business of *adding and justifying bail* in some place in or near to Westminster-hall,

^(s) Before the 11 G. 4 and 1 W. 4, c. 70, it frequently bordered on the ridiculous to witness two if not four learned serjeants supporting or opposing *bail*, and the four judges almost vying with each other in acuteness and skill in endeavouring to elicit truth from such bail with respect to their property or other matter, and when it frequently occurred that in such Court the cunning of the bail succeeded against all the learning and experience of the judges and serjeants and the bail there justified; but perhaps within a quarter of an

hour afterwards the same bail were rejected either by a different course of proceeding in the King's Bench or the more active inquiries of the plaintiff's attorney and his better affidavits.

^(t) 57 G. 3, c. 11; 1 G. 4, c. 55, s. 3.
^(u) *Hawkins v. Plomer*, 2 Bla. Rep. 1064; Tidd, 263.

^(x) Rule M. 11 G. 1, K. B.; R. T. 14 Car. 2, Reg. 2, K. B., Tidd, 509; and R. H. 17 G. 2, C. P. Rescinded in K. B. by Rule Mich. T. 2 G. 4; see 5 Bar. & Ald. 217, and Tidd, 509.

other than the usual place of sitting for the whole Court, whilst others of the judges of the same Court should proceed in the despatch of the other business of the same Court in their ordinary place of sitting in Westminster-hall," then enacted accordingly, and that the proceedings so had should be as valid and effectual as if transacted by or before the full Court. (y) But still the ancient practice of bail justifying in full Court in the Common Pleas and Exchequer continued, and in the King's Bench the single judge sat in what was called the Bail Court at half-past nine o'clock in the morning to hear the oppositions to and justification of bail, and to discharge imprisoned debtors under the Lords' Act, and which business frequently detained him in that Court until twelve o'clock, and on the ninth day of the term, when the number of bail was the greatest, he was frequently detained till near two or even three o'clock, whilst the other three judges met in banc at ten o'clock to hear sometimes motions and rules quite of course, and by which the more important business was delayed; and constantly at about three o'clock one of the puisne judges was obliged to leave the Court to despatch the usual chamber business, so that the time when the *four* judges actually heard the most important business was too limited, and in consequence much of the business accumulated towards the end of the term and on the last day of each was either pressed to a reference before the master of the Court or his deputies, or was enlarged until the next term, occasioning a great increase of expense as well as serious delay. (z) In order therefore, as appears by the recital in the act 1 W. 4, c. 70, s. 1, intituled "An Act for the more effectual Administration of Justice in England and Wales," that the appointment of an additional puisne judge to each of the superior Courts of Common Law might cause much *greater facility and despatch of business therein*, enabled his Majesty to appoint an additional puisne judge to either of the Courts of King's Bench, Common Pleas, or Exchequer, and that after such appointments the puisne judges of each Court should sit by rotation in each term or otherwise, as they should agree amongst themselves, *so that no greater number than three of*

(y) It will be observed that this act was confined to the Court of King's Bench and did not extend to the Common Pleas or Exchequer; and hence, after this enactment and until the 1 W. 4, c. 70, s. 1, the proceeding in opposing and justifying bail continued to be transacted in those Courts before all the four judges or barons of each, and sometimes they were beneath

the dignity of those Courts, see *ante*, 12, note (s).

(z) Also since that enactment the necessity for an additional judge has been increased by the act 3 & 4 W. 4, c. 41, requiring the frequent attendance of some of the judges at the judicial committee of the Privy Council; *ante*, vol. ii. 573 to 585.

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them should sit at the same time in banc for the transaction of business in term, unless in the absence of the Lord Chief Justice or Lord Chief Baron, and that it should be lawful for any one of the judges of either of the said Courts, when occasion should so require, while the other judges of the same Court are sitting in banc, "to sit apart from them for the business of "adding and justifying special bail, discharging insolvent "debtors, (a) administering oaths, receiving declarations required by statute, hearing and deciding upon matters on "motion, and making rules and orders in causes and business depending in the Court to which such judge shall "belong, (b) in the same manner and with the same force and "validity as may be done by the Court sitting in banc." And the 4th section authorizes "every judge of the said Court, to "whatever Court he may belong, to sit in London and Middlesex for the trial of issues arising in any of the said Courts, "and to transact such business at chambers or elsewhere, (c) "depending in any of the said Courts, as relates to matters over "which the said Courts have a common jurisdiction (d) and "as may according to the course and practice of the Court be "transacted by a single judge."

Since this act a puisne judge of each of the Courts, during the terms, may set apart in a separate Court when the press of business requires; and in the King's Bench one of the puisne judges in rotation, and usually for a term continuously, sits at half-past nine o'clock in the morning every day, until the business brought before him has been disposed of, or until the afternoon, excepting on those appointed days when, during the term, he may have to try common jury causes.

(a) The first enactment of this nature was 57 G. 3, c. 11, followed by 1 G. 4, c. 55, s. 3, and 3 G. 4, c. 192, but virtually repealed by this act, 1 W. 4, c. 70. The Insolvent Act, 1 W. 4, c. 38, s. 10, transferred the discharge of imprisoned debtors under the Lords' Act, 32 G. 2, c. 28, s. 13 to 16, on their own petition, to the Insolvent Court. So that no longer is any judge of either of the superior Courts burdened with that disagreeable branch of business. But the compulsive clauses, on the application of a creditor, viz. 32 G. 2, c. 28, s. 16, are still in force, and are to be made to a single judge in the Practice Court as

heretofore.* And an application by an imprisoned debtor for his discharge after a year's imprisonment for a debt or damages, under 48 G. 3, c. 123, is still to be made to a single judge in that Court.†

(b) This only gives power to pronounce a rule or order in a particular cause, and not an authority to make rules or orders affecting the general practice of the Court.

(c) Consequently any judge on the circuit, to whatever Court he may belong, may amend; and see 1 G. 4, c. 55, s. 5, 9 G. 4, c. 15, 3 & 4 W. 4, c. 42, s. 23.

(d) See construction, *post*, 23.

* See cases Chitty's Col. Stat. 581 to 586.

† See Chitty's Col. Stat. 589, 590, 10 Bar. & Cres. 481. That act extends to

damages, *Winter v. Elliot*, 1 Adolp. & Ellis, 24; but not to imprisonment for a contempt of an Ecclesiastical Court, *Ex parte Kaye*, 1 Bar. & Adolp. 652.

A puisne judge of the Court of King's Bench in rotation, for a term, sits in a small Court on the left-hand side of the passage leading from Westminster Hall into the principal Court of King's Bench, and having also a direct entrance from Westminster Hall, and is now usually called the *Practice Court*, though sometimes called the *Bail Court*. (d)

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Where holden.

The puisne judge of the Court of Common Pleas, before the destruction of the Houses of Lords and Commons, in October, 1834, also in rotation usually sat for the purposes mentioned in the act at ten o'clock in the morning on each day of term, in a small Court in Westminster Hall, situate immediately up steps on the left of the entrance into the Hall, and called the Court Palatine of Lancaster, and he afterwards at the usual hour attended at chambers. (e) But on the 4th of November, 1834, Mr. Justice Gaselee came upon the bench of the principal Court of Common Pleas, before the other learned judges entered the Court, and stated to the bar that for the remainder of that term one of the judges would sit in the ordinary Court in which the full Court was held, at a quarter before ten o'clock, to hear motions on justification of bail, as from the then state of the Hall there was no other place to sit in for that purpose.

Common Pleas.

A puisne judge, or Baron of the Court of Exchequer, also in rotation, sits in the same place as the Court in Banc, to hear justifications and oppositions of bail, though at an earlier hour. But in practice even the most ordinary motions relating to practice are heard and determined in full Court, and consequently the authority of the decisions in the Court of Exchequer on matters of practice, under the Uniformity of Process Act, 2 W. 4, c. 39, may be considered of more weight than those of the Practice Court attached to the Court of King's Bench.

Exchequer.

The enactments in 11 G. 4, and 1 W. 4, c. 70, as far as respected the justification of bail, was a repetition of the jurisdiction given to a *single judge* by 57 G. 3, c. 11, and 3 G. 4, c. 48, with the additional power of *hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court*, (i. e. in each particular action or proceeding depending there). After the king had exercised this power by appointing an additional judge to each of the superior Courts in Michaelmas term, 1830, Lord Ten-

3. The operation of the 11 G. 4 and 1 W. 4, c. 70, as to the Practice Court.

4. The extent of jurisdiction and course of proceeding in Practice Court of King's Bench.

(d) See Mr. Dowling's Reports of the decisions in this Court.

(e) Archbold, Pr. C. P. [2].

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terden informed the bar, " that in *addition* to the powers then already exercised by *one judge sitting apart* from the others in the Bail Court, *all matters of practice* would for the future be determined by *him*. (f) And since this enactment it has become usual, at least as respects the Practice Court of the King's Bench, held before one judge in rotation, not only to hear and determine *common matters of practice*, but also in ordinary cases even motions for writs of mandamus and of prohibition, certiorari, &c. (g) But if any doubt should arise in the mind of the presiding judge as to the propriety of granting any such rule, he usually refers the party applying, to the full Court, or himself consults the judges thereof; and should rules *nisi* be granted in any of the above instances, viz. of mandamus or prohibition, *cause* against the same is generally shewn in full Court. So cases of difficulty are, at the instance of the judge himself, *ex meromotu*, sometimes *re-argued* before the full Court; that, however, is only in the judge's discretion, *for the decision of the single judge is conclusive in all matters brought before him*, unless he think fit to open the case for a rehearing; (g) in which respect the decision of a single judge in the *practice Court* differs very materially from the decision of a judge at chambers, which does not preclude an appeal to the full Court on the merits, except in those few cases where the legislature has, by the terms of an enactment, expressly directed that the judge's decision shall be final.

The Interpleader Act, 1 & 2 W. 4, c. 58, s. 5, we have seen, expressly provides, that if upon application to a judge in the first instance, or in any later stage of the proceeding, he *shall think the matter more fit for the decision of the Court*, he is authorized to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a judge. (h)

It should seem that when *summary* jurisdiction has by the terms of an enactment been given to the *Court*, and not merely to a single judge, the Court *in Banc* ought to decide in a case of that nature, and not a single judge, (i) as it can scarcely be

(f) 1 Dowl. Prac. Rep. Preface iv.

(g) *Ibid.*

(h) *Ante*, vol. ii. 545, note (s). It will be observed, that the desire of the suitor to appeal to the full Court is not allowed to have any effect, but it rests entirely upon the discretion of the judge.

(i) For instance, cases of awards, annuities, and mortgage deeds, *ante*, vol. ii. 328 to 333; appeals by tenants against justices' decision, *id.* 361, where it is manifest the legislature intended that the matter should be determined upon in the Court in Banc.

supposed that the 11 G. 4, and 1 W. 4. c. 70, s. 1, without *expressly* referring to the particular statutes, giving summary jurisdiction to the whole Court, intended to deprive suitors of the benefit and security in the decision of several judges in lieu of one.

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The *common paper*, as it is technically termed, and including demurrer books, writs of false judgment, and writs of error, (now only from inferior Courts,) when not set down for argument in full Court, or when so set down, if counsel cannot, in answer to an application for immediate judgment, suggest to the satisfaction of the judge some arguable point, are also disposed of in *this* Court; but special cases, and really arguable demurrers, must be decided in banc. A *separate peremptory paper*, containing all matters of practice, as principally rules for judgment as in case of a nonsuit and other short practical rules, is made out and cleared in this Court, in the same manner as in the Court in Banc.

Common paper and peremptory paper of this Court.

As regards the *despatch* of business, unquestionably this Court, holden before a single judge, is useful; but unless very cautiously exercised, it might become a most objectionable tribunal. It is true that there are some of the most experienced officers of the principal Court usually attending to inform the judge of what they consider to be the *established practice* of the Court in case he should think fit to consult them, yet if hereafter it should be possible that a single judge should be too confident in his own opinion to think it expedient to consult such officers, serious inconveniences might result. It has not unfrequently occurred, that the rights of suitors have, in one term, been decided upon by a single judge in one way, when another judge, who has presided the term before, decided differently, which could scarcely occur in the full Court, where we have seen it is a maxim that the parties to each cause are entitled to be satisfied by knowing the opinion of each judge, and the grounds on which it is founded, and that therefore each judge should deliver his opinion seriatim, so as not only to evince his concurrence, but also the principle upon which his decision proceeds; and the full examination of the subject in Banc leads to a better decision. (k) And certainly there are many cases of practice involving very intricate

6. Limited expediency of this Court.

(k) *Ante*, 7, n.(a), Per Bayley, B., in *Young v. Timmings*, 1 Tyr. Rep. 238, where he said, "Although Lord Lyndhurst has in a great degree anticipated the judgment which I intended to deliver, the

parties to the cause are entitled to be satisfied by knowing the opinion of each judge, and the grounds on which it is founded."

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questions of law or fact, and either directly or collaterally, or in respect of the amount of *costs*, of great importance, and require the opinions of several judges, and are unfit to be decided by one. (*l*) This, therefore, is a jurisdiction not in practice to be extended, more especially as it would be objectionable, and contrary to the intention of the statutes, which have delegated a summary jurisdiction to the *superior Courts* of law, as the Habeas Corpus Act, the Arbitration Act, the Annuity Act, the Landlord and Tenant Act, and some others presently noticed, for a single judge to decide in such cases; but yet we find recent decisions where a single judge has decided even upon the jurisdiction of the Ecclesiastical Courts. (*m*) It will be observed, upon examination of the reports in the Court of C. P., that points of practice are there discussed in *banc*; and from Mr. Tyrwhitt's reports, and those of Messrs. Crompton, Meeson and Roscoe, in the Exchequer, that Court also in general continues *in banc* to decide upon all questions, even of practice, of the least doubt, difficulty, or novelty, and consequently it may be presumed that the decisions of the Courts of Common Pleas and Exchequer are more to be depended upon than those in the Practice Court of K. B.

Certainly it would be objectionable and unconstitutional for a *single judge* to assume to decide upon a point manifestly intended by the legislature to be determined by the *full Court*. (*n*) But at the same time, when it is recollected that at Nisi Prius, (excepting on trials at bar), only one judge presides and determines upon law and fact, and that in Equity and Ecclesiastical Courts only a single judge presides, and frequently decides upon most important and difficult questions, perhaps no serious objection could be made, if the *legislature* should vest even extended powers in a single judge sitting in a Practice Court, provided the matters should be *formally* and *deliberately investigated* upon affidavits, motion, rule nisi, and rule absolute, and openly discussed and decided upon before the public and intelligent officers, a jurisdiction standing certainly on very superior and preferable grounds to any proceeding *before a single judge at chambers*.

(*l*) See *ante*, 7, note (*b*).

(*m*) *Birch v. Brown*, 1 Dowl. Pr. R. 395; but that was a case of *habeas corpus*, in which, by statute 56 Geo. 3, c. 100,

in vacation a single judge is bound to decide; *ante*, vol. I. 686.

(*n*) See instances, *post*, 24.

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Third. The Jurisdiction of a Single Judge at Chambers.

Thirdly. By long established usage, each of the judges of the Courts of King's Bench, Common Pleas and Exchequer, has, at *common law*, and independently of any legislative authority, at his *chambers* exercised a very extensive jurisdiction over certain minor and practical proceedings, *especially irregularities* that arise in conducting an action or defence, and this as well in the vacations as during the four terms. It would be difficult if not impracticable to trace the *inception* of this practice. It has been observed, that probably it originated either in the overflow of the business of the full Court in term, or the expediency of certain matters, probably much of course, though sometimes obstinately disputed by the parties, being decided upon or transacted before a single judge, as well to avoid the expense of formal rules, as to prevent the important time of the Court in Banc being consumed in disposing of trifling matters; and in the vacation, from the absolute necessity for some tribunal having power to interfere and relieve from the consequences of the abuse of the process of the Court, or of irregularities, as by illegal arrest, or execution under irregular or insufficient proceedings, under which otherwise a party might continue in imprisonment, or his goods be irretrievably sold under an execution, sometimes without any redress, and at least not otherwise redeemable until the next term.⁽ⁿ⁾ The authority of a judge at chambers to make orders in the various cases which are brought before him is, when considered upon principle, the authority of the Court itself; his order may be considered as an *inceptive* act of the Court; he ought never to make such order, unless from his experience in the practice of the Courts he knows that it is most probable that the majority of the Court would afterwards, if appealed to, ratify such order. And although the order is usually obeyed from respect, or fear of its being afterwards enforced and disobedience punished, yet no order which is made can be enforced by attachment until it has been first made a rule of the Court, and the party who disputes the propriety of the order has an opportunity to question its validity by application to the Court.^(o) And although an order has been acquiesced in

The jurisdiction of a single judge at chambers, either in vacation or term. (n)

1. In general.

2. This jurisdiction at common law.

(n) See in general Tidd, 9 ed. 509 to 511, 469, 470; and see *post*, summons and order; Mr. Bagley's Fr. Chambers, *per tot.* a distinct work upon the subject, very ably composed; and see the juris-

diction of a single judge at chambers examined and illustrated by Tindal, C. J. in *Doe d. Prescott*, 9 Bing. 104.

(o) Per Tindal, C. J. in *Doe d. Prescott*, 9 Bing. 104.

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and acted upon, still it must be made a rule of Court before an attachment can be obtained for disobeying its directions. (*q*) With respect to *attornies*, when an action is depending, but not otherwise, a judge at chambers may, on summons, order an attorney to pay over monies received by him for the use of his client; (*r*) and there are numerous other instances of judge's orders against attornies. (*s*)

3. A single
judge's jurisdic-
tion when to be
resorted to.

Where by the usage of the Courts a judge at chambers has jurisdiction, and it has been the constant course for matters of a particular description to be disposed of only there, the judges would censure the making an application to the Court, as calculated to increase the costs; as in the instance of a motion and rule to compel a party to deliver a copy of an agreement to the applicant and produce the original at the stamp office to be stamped, which is an application usually made with success at chambers. (*t*)

In many cases authority has been given by *statute in express terms* to a single judge to perform *certain acts at chambers*, and we have seen that whenever a statute gives a summary jurisdiction, the terms of the enactment must be strictly pursued. (*u*) Thus the annuity act 53 Geo. 3, c. 141, s. 5, expressly authorizes a judge of the K. B. or C. P. (singularly omitting the Exchequer) *on summons* to make an order for the production of the instrument, by which an annuity or rent charge required to be enrolled under that act shall be secured; and for suffering the complainant to take copies and examine the same with such copies, and otherwise in the premises as to the judge shall seem meet. So the 1 Will. 4, c. 7, s. 1, enables a judge *to stay judgment* on a writ of inquiry in vacation. So the uniformity of process act, 2 Will. 4, c. 39, s. 15, and Rule M. T. 3 W. 4, 1832, enable a single judge *in vacation* to make an order on a sheriff to compel the immediate return of mesne or final process, in order to expedite the suit; though it would seem to follow, that during term the Court, and not a single judge, must pronounce the rule or order for returning a writ. And the same act, section 14, having required the judges to make rules for the effectual execution of that act as to the prescribed forms of process and indorsements thereon, all the judges in

(*q*) *Baker v. Rye*, 1 Dowl. Pr. C. 689. But as regards a judge's order upon a bailable writ, made in vacation, if it be disobeyed, *subsequent compliance*, before the next term, will not prevent an attachment from issuing *nunc pro tunc*, see Rule Mich. T. 3 W. 4, 1833.

(*r*) Price N. P. 306; *Ex parte Higgs*, 1 Dowl. Pr. C. 495.

(*s*) Bagley Cham. Pr. 47 to 55, a very useful work.

(*t*) *Reid v. Colman*, 2 Cr. & M. 456.

(*u*) *Ante*, vol. ii. 327, note (*i*).

M. T. 3 W. 4, 1832, promulgated amongst others a rule that any *omissions* in any writ or copy or indorsement should be deemed an irregularity, and might be set aside as irregular upon application to the Court *or to any judge*. And therefore, as regards all *omissions* in process, or copy or indorsements, a single judge at chambers, as well in term as vacation, has jurisdiction to set the same aside for such irregularity. So the 3 & 4 Will. 4, c. 42, s. 17, gives a single judge, as well as the Court in banc, jurisdiction to *order* that the issue or issues joined in an action for any *debt* or demand not exceeding twenty pounds, shall be tried before the sheriff of the county where the action is brought, (i. e. venue laid,) or the judge of any Court of Record for the recovery of the debt in that county; and in case it should be necessary to postpone the trial, a single judge impliedly has power to give effect to an application for that purpose. (x) So although an application for relief, when made by a *sheriff* under the sixth section of the interpleader act, 1 & 2 Will. 4, c. 58, must be to the Court in banc, and not to a judge at chambers, who has no jurisdiction; (y) it is otherwise under the first section in other cases when the application may be to the Court or a judge; though in the latter case with an appeal to the Court. (z) In short, there are so many modern enactments giving a single judge jurisdiction, that with the exception of a few provisions of a general nature, it becomes necessary in most cases to examine the particular powers of each act.

It was observed by Mr. Baron Bayley, "that since the uniformity of process act, a judge at chambers is in a very different situation to what he was in before that act. A great deal of new business is now thrown upon him in vacation by the 2 Will. 4, c. 39, s. 11; and although the act certainly does not give power to a single judge in express terms, yet it seems to be *impliedly given him in some cases*; as where a declaration is delivered in vacation, and is irregular, cannot an application be made to a judge to set aside the declaration with costs?" (a) In other words, as the new statutes and rules founded upon them now enable the parties to commence an action and proceed even to execution in the same vacation when the Court is not sitting, those regulations impliedly give a single judge jurisdiction to interfere in all cases of irregularity, and all other necessary powers essential for the justly taking such proceedings in a cause; for otherwise, from want of the full Court being sitting, there would be a failure of justice. It must also be observed, that

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(x) *Packham v. Newman*, 3 Dowl. 163, 166.

(z) 1 & 2 W. 4, c. 58, s. 4.

(y) Per Alderson, B., in *Brucknburg v. Lauriz*, 3 Dowl. 180.

(a) Per Bayley, B., in *Hughes v. Brand*, 2 Dowl. 132.

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the uniformity of process act, 2 Will. 4, c. 39, s. 14, as well as the 11 Geo. 4 and 1 Will. 4, c. 70, s. 11, authorized, and indeed *required* the judges to make rules for regulating the practice; and the rule thereon of Mich. T. 3 Will. 4., A. D. 1832, expressly orders, "that if the process or indorsements do not conform to the forms prescribed by the statute and rules, the same may be set aside as *irregular* upon application to the Court out of which the process issued, *or to any judge.*" It has also been decided, that applications for irregularities must be made soon after they have arisen and *in vacaton*; and that if the party wait until the next term he may be too late. (a) Of necessity, therefore, it is clear that the jurisdiction of a single judge in vacation, has impliedly been much extended by the new enactments and rules.

4. In what cases a single judge or baron of either of the three superior Courts may act in matters not depending in his own Court.

As it frequently occurred in the vacation, and especially during the circuit, that although a judge of one of the Courts was in or near London, yet no judge of the *particular* Court in relation to which the requisite business was to be transacted was at hand, the 11 Geo. 4 and 1 Will. 4, c. 70, (which in section 1 gave the power of appointing an additional judge in each Court) by section 4 authorized "a judge of either of the three Courts, *to whatever Court he may belong*, to transact such business *at chambers or elsewhere*, depending in *any of the said* Courts, as relates to matters over which the said Courts have a *common jurisdiction*, and as may according to the course and practice of the Court be transacted by a single judge." Since which enactment, by arrangement, one of the fifteen judges during the circuit remains in town, and transacts the greater portion of the chamber business for several successive weeks, but is occasionally (but in practice scarcely for more than one day) assisted by the two judges who travel the home circuit, and who avail themselves of such short intervals as may occur between the termination of the assizes at one county town, and the day appointed for opening the commission at the next, to return to London for that purpose. (b) But this rarely occurs excepting on the return of the judges from Chelmsford in Essex, for usually in Kent, Sussex, and Surrey, the press of business will not allow them time to come to, or at least remain in London, for any time sufficient to assist the single judge who continues in town. It will be observed, that the terms of the act limit the jurisdiction of the single judge

(a) *Cox v. Tullock*, 3 Tyrw. Rep. 578, M. 345.
591; *Elliston v. Robinson*, 2 Crompt. & (b) *Bagley's Chamber Practice*, 16.

not merely to such matters over which the judges of the three Courts have a *common jurisdiction*, but also to matters that may “*according to the course and practice of the Court be transacted by a single judge*,” thus leaving it in each particular case to be ascertained whether the *established course* and practice of the Court will justify the single judge to interfere. Under 11 Geo. 4 and 1 Will. 4, c. 70, s. 4, an *affidavit* may be made before a judge of one Court, though the cause to which it relates, and in which it is to be used, is depending in another Court; and this even in cases of contempt of a Court to which such judge does not belong; (c) and the Court observed, that the “*common jurisdiction*” mentioned in the act, was to be understood with reference to the subject matter of the application, and not to the Court itself. (c) However, the usual practice at chambers excepting during the circuits, or when only one judge is in town, is to obtain a summons returnable before a judge of the Court in or relating to which the business is to be transacted, and also to obtain an order of a judge of that Court, and not without absolute necessity to apply to a judge of any other Court. (d)

The 56 Geo. 3, c. 100, expressly authorizes, and indeed in certain cases imperatively *requires*, any judge or baron to issue a writ of *habeas corpus in vacation*, returnable before him or any other judge immediately; or if the writ be issued late in the *vacation*, it may be returnable in the next term, and in the former case, the single judge is in vacation to examine into and decide upon the matter, and discharge, remand, or bail the party; and the 43 Geo. 3, c. 46, s. 6, enables a single judge *in vacation* to *bail* a party in *actual custody* on civil mesne process, but expressly prohibited *his* bailing in term time. The 11 Geo. 4 and 1 Will. 4, c. 70, s. 12, however, now expressly enables a judge *at chambers*, or elsewhere as he may appoint, either in term time or in vacation, to hear the justification of bail, whether the defendant be or not in custody. But it seems that a single judge sitting at chambers has not, at least *in vacation*, and it should seem not in term, unless on motion to him in the *Practice Court*, power or jurisdiction to make an order to quash a *defendant's demurrer* on the ground that it appeared to him to be sham for the purposes of delay, and

(c) *Phillip v. Drake*, 2 Dowl. Pr. C. 45. But an affidavit and other proceedings in support of a criminal information cannot properly be sworn or take place before a judge of C. P. or Exchequer, because the judges of those Courts have

no *common jurisdiction* with K. B. over criminal proceedings; *Rex v. Bryant and others*, K. B. January 31, 1835.

(d) And see Price's New Pr. 316; Bagley's Ch. Pr. 9.

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giving leave to the plaintiff to sign final judgment in ten days; and the Court of Exchequer on motion set aside such order, and Bayley B. said a single judge has no such power, and the 11 Geo. 4 and 1 Will. 4, c. 70, s. 1, only applies to a single judge sitting in term while the other judges are sitting in banc, i. e. a judge sitting apart, and proceeding as directed by that section, i. e. *in the Practice Court* and not at chambers. (e).

5. When a single judge cannot act either in term or vacation.

But when a statute in express terms *limits* the jurisdiction to the "*Court*" or "*during the term*," then even the Court itself cannot direct that cause shall be shewn against its own rule either in vacation or term at chambers. (f) Thus as the act 48 G. 3, c. 123, declares that a debtor who has been in custody for twelve months for a debt or damage under £20, may have relief "by rule or order of Court, upon application *in term time*;" it was decided that even the Court has no power to order cause to be shewn *at chambers*, which necessarily would not be a compliance with the direction of the statute requiring the interference of the Court sitting in banc. (f) So as the 18 Eliz. c. 5, s. 3, only authorizes the compounding of a penal action by leave of the *Court*, a single judge has not, either in vacation or term, any jurisdiction to grant leave to compound a penal action, and there must also be the consent of counsel; (g) and when a statute still in force distinctly enacts, that in *term* time the *Court* shall decide upon a matter, and gives power to a single judge to decide upon the same *only in vacation*, an order cannot be made by a single judge *in term*, even upon a summons taken out in vacation, and although the order was only delayed until the beginning of the term by an irregularity in the affidavits. (h) And all matters relating to the re-admission of attornies must be settled in term time in Court, and not at chambers. (i) And where money has been paid into Court pursuant to the 43 G. 3, c. 46, s. 2, the defendant cannot obtain the same out of Court by application to a judge, but must apply to the Court in banc. (k)

6. Jurisdiction of a single judge at chambers during the terms.

Formerly, in order to prevent the inconvenience arising from the Court and a judge at chambers sitting at the same time, though at different places, and the impracticability of an attorney attending in person to his duties in both, there were

(e) *Foster v. Barton*, 3 Tyrw. 380.

(f) *Jones v. Fitzaddams*, 3 Tyr. 904;
1 *Crompt. & Mee.* 355; 2 *Dowl.* 111,
S. C.

(g) *Morgan v. Lute*, 1 Chit. Rep. 381.

(h) *Huskins v. Morris*, 1 Bos. & Pul.
92, on *Lords' Act*, 32 G. 2, c. 28, s. 13.

(i) *Ex parte Owen*, 1 *Dowl.* 511.

(k) *Geach v. Coppin*, 3 *Dowl.* 75.

express rules that no attorney or other person should be *summoned* to attend any justice of the King's Bench, nor any matters be transacted before such justice at his *chambers* or elsewhere out of Court during the *sitting* of the Court at Westminster,^(l) and there was a similar rule in the Common Pleas.^(m) But those rules merely prohibited chamber practice during *those hours* when the Court in banc was *actually sitting*, and did not prevent the practice at *chambers in the evening*; and the above rule for the King's Bench was expressly discharged by a subsequent rule of that Court.⁽ⁿ⁾ And it is now, in order to avoid inconveniences resulting from late attendance at chambers in the evening, the established practice of *all the three Courts* for one of the judges to attend daily at chambers, during term, *from three, or half-past three o'clock, until five o'clock*,^(o) or even later, until the business to be then transacted has been disposed of; and now the evening attendance of the judges at chambers in term time is discontinued.^(p)

This practice of one judge for each Court attending as well in the Practice Court *during term time* in the morning, and in the afternoon at chambers, where he is detained frequently until a late hour in the evening, although extremely burthen-some to the judges, is exceedingly advantageous to the suitors, so long as the single judge abstains from assuming to decide upon matters of the least difficulty, which ought constitutionally to be determined by the Court *in Banc*; because, if such ordinary matters, almost of course, were required to be transacted in Court upon affidavits, motion, rule nisi, and rule absolute, instead of at most two summonses and the order of a single judge at chambers, there would not only be the useless retainer of counsel, and other considerable expense for Court fees and the delay of four or six day rules, but also a great waste of the time of the four judges, who have scarcely sufficient opportunity fully and maturely to consider the really difficult and important matters pressing for their decision.^(q) But on the other hand, it would be a dangerous and injudicious assumption of jurisdiction for a judge at chambers to decide

(l) R. M. 11 G. 1, K. B.; see R. T. 14 Car. 2, reg. 2, K. B. Tidd, 509.

(m) R. H. 17 G. 2, C. P.

(n) R. M. 2 G. 4, K. B. 5 Barn. & Ald. 217.

(o) In the note to 5 Barn. & Ald. 217 the hours are from half-past two until half-past four, but they vary.

(p) Tidd, 509, 510.

(q) It must be observed that the

judges are not only detained in Court during the term till four or five o'clock in the afternoon, but in the evening they have to read and consider demurrer-books, special cases, and cases in the crown paper and other proceedings, preparatory to discussion on the next day, and they have scarcely time to get through their burthensome duties.

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upon difficult questions of law or fact, or lengthy contradictory conflicting affidavits, properly requiring much nice and scrupulous examination, comparison, and deliberation to decide upon, and which, if duly investigated *before him*, would occupy that time which more judiciously should be devoted to the despatch of the pressing business of *numerous* parties waiting to have their more concise matters quickly disposed of. It will be observed, that even as regards mere matters of practice, the judge here presides alone unassisted by any experienced officer as in the Practice Court, and that he is in general hurried by the press of a great concourse of applicants, all anxious to be dismissed in a short time; the judge, therefore, has a jurisdiction to be exercised with great caution, and not, at least in term time, in cases of the least doubt. If the application appear to the judge novel or doubtful on principle, or even on the facts, then he should decline to interfere, or at most stay the proceedings quousque, so as to afford the applicant an opportunity of bringing the matter upon full affidavits before the Court in the ensuing term. (*r*)

A judge at chambers cannot make an absolute indefinite and continuing order, either to set aside or to stay proceedings; at most he has only power to stay the proceedings for a *time*, as until the next term, or until a rule nisi has been applied for,

(*r*) When it is considered that in Courts of Equity and Ecclesiastical Courts a *single judge* in all cases presides, the objection to chamber practice is not to the *judge*, but to the *place*. The practice at chambers was originally designed only for disposing of small matters *quite of course*, so as to relieve the time of the Court in matters not requiring four judges to determine upon. But in cases in the least out of the ordinary course, or where there are long or conflicting affidavits requiring comparison and strict examination, it is improper to occupy the time of the judge at chambers which ought to be distributed amongst numerous suitors anxious to be dismissed. If suitors should absurdly press a judge at chambers either in term or vacation to decide upon difficult or lengthy matters, they ought not afterwards to complain of what they might term a hasty decision; and although they might be at liberty to re-investigate the matter by motion to the Court, it must be remembered that the prior unfavourable decision of an experienced judge will naturally and properly excite a prejudice in favour of his decision, which, even if erroneous, it might be difficult, if not impracticable, to remove. Since the appointment of the *Practice Court*, holden before one of the puisne

judges in rotation during the terms, there is still more objection to the bringing difficult or lengthy matters before a judge at chambers, which might be disposed of in such Practice Court by the intervention of counsel there attending, without requiring their hurried and inconvenient attendance at chambers, and it might be well if the practice were not to hear counsel at chambers. When it is remembered that even the judges frequently differ in opinion after hearing full discussions before them, and sometimes err, it is to be regretted that great discredit has been brought upon chamber practice by the very frequent exercise of jurisdiction in cases by no means clear upon new enactments and rules, and the consequent unfortunate discordance and contradiction in the decisions of different judges, rendering the practice so uncertain and unsettled, that scarcely any practitioner can proceed with confidence in any step he may take. Cases of delicacy, as disputes between relatives or impeaching character, or otherwise requiring *private* discussion, and where the judge will obligingly adjourn the first meeting, and take the trouble of deliberately examining the affidavits before the hearing, may justly constitute exceptions.

so as to afford a party an opportunity of applying to the Court to set them aside or stay them generally. (s)

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The regular hours of attendance at chambers *in vacation*, are from eleven or half-past eleven in the forenoon, to one o'clock in the afternoon, or usually until the business of all the persons in attendance has been disposed of. The hours of attendance at chambers in *term time* are from three o'clock until five, after which hour the judge may, if he thinks fit, decline sitting until the same hours the next day; in practice, however, the anxiety of the judge to despatch all the business before him frequently induces him for that purpose to continue at chambers much later.

7. Hours of attendance at chambers in vacation and during the terms.

Before the Uniformity of Process Act, 2 W. 4, c. 39, s. 11, as well as since, (though not so frequently as before, because there is now more time in the term for the full Court to determine the matters before them,) when motions have been made late in the term, or been enlarged until towards the end of it, or have otherwise stood over from various causes, if it be essential for the purposes of justice not then to decide upon the same, nor on the other hand to enlarge the hearing until the next term, the Court will *sometimes permit a hearing at chambers* in vacation, as in a week or ten days after the term, so as not to interfere with the circuit. (t) And where the coroner has returned *cepi corpus* to a writ of attachment against the sheriff of Middlesex on the last day of term, it is of course to move on that day for writs of habeas corpus to bring up the bodies of the sheriffs before one of the judges at chambers, and which motion being of course requires no affidavit. (u) And cause may be shewn at chambers in vacation against a rule for paying money out of Court to a defendant, on the ground that he has put in and perfected bail under 7 & 8 G. 4, c. 71. (v) But in general the hearing at chambers of a rule nisi is to be considered *matter of indulgence*, and is granted by the Court only when the justice of the case requires a speedier decision than could be obtained by waiting until the next term; for otherwise, and especially when the rule nisi was obtained late in the term, the Court will enlarge the rule until the next term, especially in the case of a motion for judgment as in case of a nonsuit, which in general, and always so in a

8. Business of the term transferred to a judge after term.

(s) *Spicer v. Todd*, 2 Tyr. 172; *Tidd*, the cause of *Walker v. Whaley*, 1 Chit. Rep. 249.

(t) 1 Chit. Rep. 232, n. (a).

(u) *Rex v. The Sheriff of Middlesex*, in 155.

(v) *Hanwell v. Mure*, 2 Dowl. P. C.

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country cause, might have been made within the first four days of the term;(x) and there can be no reason to indulge a party who complains of the laches of his opponent, when he himself has been unnecessarily dilatory in his proceedings. And the Court have refused to direct cause to be shewn at chambers on a motion for judgment against the casual ejector,(y) or against a rule for an attachment for nonpayment of costs.(z) But it has been permitted to shew cause at chambers against a rule nisi for setting aside an attachment for nonpayment of costs according to the master's allocatur.(a) But although the first and second section of the Interpleader Act, 1 & 2 W. 4, c. 58, gives a *single* judge, as well as the Court, jurisdiction *in general* to interfere, yet the 6th section relative to *sheriffs* only authorizes the *Court* to interfere; and, therefore, when an application is made under that act on behalf of the *sheriff* late in the term, the Court will not direct cause to be shewn at chambers after the term.(b) And we have seen that where a statute requires *the Court* to decide, the decision cannot be delegated to a single judge.(c) And the powers of a single judge at chambers are limited by general principles and practice, and therefore a judge at chambers has no power *directly* to allow a defendant more time to pay a debt than the law allows, and consequently cannot, without the consent of the plaintiff, order that the debt shall be paid by named instalments.(d)

In general when the Court expressly transfer the decision to one of its own judges, such judge impliedly has all the same powers as the Court in banc, and as a consequence may award *costs*, or declare that no costs shall be paid, or forbear to say any thing upon the subject of costs; and in the latter case, if the judge should set aside a proceeding for irregularity, the party may in his subsequent action of trespass, when sustainable, recover the costs of setting the proceeding aside as special damage; though if the Court or a judge has expressly adjudicated upon costs, and declared that they shall not be allowed, they cannot be recovered.(e)

(x) *Picker v. Webster*, 1 Chit. Rep. 232.

(y) *Doe v. Roe*, 2 Dowl. P. C. 88.

(z) *Fall v. Fall*, 2 Dowl. P. C. 88.

(a) *Rex v. C. D.*, 1 Chit. Rep. 724.

(b) And see *Shaw v. Roberts*, 2 Dowl. P. C. 25; *Jones v. Fitzsaddams*, 1 Crompt. & Mee. 85; 2 Dowl. P. C. 111.

(c) *Ante*, 24; *Jones v. Fitzsaddams*, 1 Crompt. & Mee. 855; *Morgan v. Lister*,

1 Chit. Rep. 381; *Huskins v. Morris*, 1 Bos. & Pul. 92.

(d) *Kirby v. Ellison*, 2 Dowl. P. C. 219. Perhaps it might be desirable to vest in the superior Courts a discretionary jurisdiction in this respect on such terms as they might think fit to impose, the same as in Courts of Request.

(e) *Pritchett v. Boevey*, 3 Tyr. 949.

The chamber practice of the judges has of late been greatly increased, in consequence of the express decisions in the Courts of Common Pleas and Exchequer, that a judge at chambers has at common law, and independently of any express enactment, a *general jurisdiction to give or refuse costs when he makes or refuses an order in favour of an application*; (f) and although the Court of King's Bench formerly considered the practice to be otherwise, (g) Lord Tenterden at the same time said, "If the subject were investigated very closely, it might be found that such a power existed;" (h) and the decision in the Common Pleas was subsequent to that in the King's Bench, and therefore probably, on formal discussion in K. B., the decisions of the Courts of C. P. and Exchequer would be adopted; (i) and of late the judges of the Court of King's Bench frequently make the payment of costs part of their orders at chambers. And, as observed by Bayley, Baron, "Since the Uniformity of Process Act, and other recent statutes, have so much increased the practice at chambers, and authorized so many proceedings in an action to take place during the vacations, and transferred to a single judge so many acts that heretofore could only be transacted in full Court, a jurisdiction to award costs seems *impliedly to be given*; (k) and, indeed, there seems no reason why, if a single judge be authorized to decide upon the *principal matter*, he should not also have, as an incident, the same power as the Court to award costs in all those cases where the Court would have awarded them, as is so general upon motions and rules." In *Doe d. Prescott v. Roe*, (l) Tindal, C. J. observes, "The authority of a judge at chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the Court itself; (m) for no order which is made can be enforced by attachment until it has been first made a rule of the Court; and the party who disputes the propriety of the order, has the opportunity to question its validity by application to the Court. (n) On any other prin-

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9. Judge's power
at chambers to
allow costs.

(f) See *post*, as to costs of irregularities, 8 Legal Observer, and 9 Legal Observer, 9. See in C. P. *Doe d. Prescott v. Roe*, 9 Bing. 104; 2 Moore & Scott, 119; 1 Dowl. Pr. C. 274, S. C.* In Exchequer, *Hughes v. Brand*, 2 Dowl. Pr. C. 131. But see *Spicer v. Todd*, 2 Tyr. R. 173.

(g) *Read v. Lee*, 2 Bar. & Adol. 415; 2 Cramp. & J. 165; Dowl. Pr. C. 307, S. C.; 9 East, 471; 2 Tyr. R. 173, note (b).

(h) Per Lord Tenterden, in *Read v. Lee*, 2 B. & Adol. 415. But see *Anonymous*, 1 Dowl. Pr. C. 52.

(i) See Bagley's Prac. 33.

(k) *Hughes v. Brand*, 2 Dowl. Pr. C. 131, 132.

(l) 9 Bing. 104.

(m) This reasoning, as expressed by the reporter, is not strictly logical; for it does not prove that a judge has power to award costs, because his order cannot be enforced without first making it a rule of Court. It

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ciple it is difficult to account for the validity of many acts done by a single judge at chambers; such as setting aside irregular judgments signed in vacation, which judgments are to be considered on principle the acts of the whole Court; and discharging persons under writs of execution improperly taken out, and the like. And considered as resting on this principle, we see no reason why a single judge should not make the payment of costs part of his order;⁽ⁿ⁾ because until such order is made a rule of the Court, where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose a great hardship in many cases upon suitors, if no such power existed. Costs are, in many cases, so important a consideration with the poorer suitor, that if he could not obtain them at chambers, he would make his application to the Court, and to the Court alone, at a much greater expense." His lordship (after reiterating and enlarging upon the same course of reasoning) concluded, "We think, therefore, the judge at chambers has the power to direct payment of costs on the same principle that he has to exercise any other authority in the progress of the cause; but at the same time it is obviously one which ought to be exercised with care and discretion." In *Hughes v. Brand*,^(o) Bayley, B. put the authority of a judge to award costs at chambers as *implied* from the Uniformity of Process Act and other recent enactments, transferring so much business to chambers that would otherwise be decided by the Court. It is singular that in *Read v. Lee*,^(p) Lord Tenterden, as a reason against allowing costs at chambers, inferred that the fear of having to pay costs, in case the application should be unsuccessful, would diminish the frequency of applications to a judge at chambers.

There is not, however, any *general* statute or rule as might be desirable on this subject; although, in some particular cases, the statute 1 W. 4, c. 22, s. 9, as to examining witnesses on interrogatories, the 3 & 4 W. 4, c. 42, s. 11, 15, and 21, and the general rules of Hil. T. 1834, No. 6 and 20, *expressly* give a judge at chambers jurisdiction over costs in those particular

is however a reason why, on *principle*, a judge *ought* to be allowed power to give costs, that no prejudice can arise, because if that part of his adjudication were unreasonable, the Court might refuse to make that part of the order relating to costs a rule of Court, or on motion discharge it. But the true question as to costs is, whether as no costs were recoverable at com-

mon law, there is any statute that expressly or impliedly gives authority to award costs upon these summary proceedings. See *post*, Costs, Tidd, 509 to 511.

(n) As the Court always may do in cases of irregularity; Tidd, 9th ed. 509 to 511, and *post*.

(o) 2 Dowl. P. C. 131.

(p) 2 Bar. & Adol. 415.

cases.(q) In a recent case, where the indorsement on a *capias* was considered irregular, it is reported that Lord Denman considered it *imperative* on a single judge at chambers, in setting aside the proceedings, to award costs, and that he had no alternative in cases of irregularity.(r) But in another case it is reported that another distinguished judge refused costs, saying, had you applied to the Court, costs might have been ordered, but if you choose to come to this cheap and summary tribunal you cannot have them.(s)

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In the exercise of the jurisdiction over costs, an enlightened judge observed, that whenever a party captiously takes an objection to a proceeding wide of the merits, and fails in establishing such objection, it is proper to make him pay costs to the opponent who has to resist his trifling attempt; and that when the objection succeeds, yet if it were illiberally taken, and was not necessary as regards the merits, no costs should be awarded to be paid by the party in error, excepting the fees to the judge's clerk for the summons and order, and any expense occasioned by rectifying the proceeding. It is fit that the statutory regulations should be compulsory, and their observance enforced; but, at the same time, frivolous objections should not be encouraged by a captious party deriving any pecuniary advantage in recovering costs.(t) That doctrine accords with the decision upon demurrer to a declaration for an *untechnical* commencement, where, although the Court held the objection not to be a ground of demurrer, yet, as the statement objected to was untechnical, they compelled the plaintiff to amend and to pay his own costs, on the ground that infinite mischief has been produced by the facility of the Courts in overlooking errors in form, which encourages carelessness, and places ignorance too much upon a footing with knowledge.(u)

In cases where the *Court in banc* must or would award costs in respect of *irregularity* in a proceeding, it should seem that *a fortiori* a single judge ought also to award such costs upon deciding on a similar objection on summons; *first*, because the decision of the full Court in such a case, as regards costs, establishes on principle what is the best practice as regards the allowance of costs; *secondly*, because if a single judge should refuse costs, an attorney taking the objection will, when he has

Reasons for a single judge allowing costs in certain cases.

(q) But it should be observed that these particular powers, in enumerated cases, impliedly negative the supposition of any general power, or at least a doubt whether any general power exists.

(r) *Shirley v. Jacobs*, Legal Observer,

vol. viii. 487, 488.

(s) Legal Observer, vol. ix. 9.

(t) Per Lord Ellenborough, MS. Mich. T. 1816.

(u) Per Eyre, C. J. in *Morgan v. Sargent*, 1 Bos. & Pul. 59.

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the option of moving the Court, be induced to do so instead of applying by summons, and incurring trouble and loss of time without remuneration, and thereby greatly increase the expenses as well to the party guilty of the irregularity, as occupying the more valuable time of the judges or barons in banc; and *thirdly*, because the probability of his having to pay costs in case his motion should not succeed, is not a reason of itself sufficient to repress the adoption of the more expensive proceeding, when he could get no costs upon a summons.

10. When a judge's order is beyond his jurisdiction, or improper, how to proceed.

The jurisdiction of a single judge at chambers is impliedly, at least, as limited as that of the full Court, and indeed should in general, in term time, or even vacation, accord with established precedents or positive enactments, unless clearly a case new only in instance, but sanctioned by admitted principles. A judge at chambers, therefore, cannot make an order against the plaintiff's consent to stay proceedings on payment of debt and costs *by monthly instalments*; and it was considered that the plaintiff might treat such order as a nullity, and proceed in the action by delivering a declaration; for, *per curiam*, "a judge at chambers can at most only give to a defendant in such cases the time *he would have had by law*, and here the payment was postponed for *many months*;"(x) and yet in some instances a judge's discretion is limited only by what he may consider reasonable, as in giving time to plead. It will, however, rarely occur that a judge's order will be so absolutely void as even *in law* (and independently of that deference and respect which ought always to be paid to the decision of a judge) to justify any practitioner in treating it as a nullity; and certainly, in due respect and prudence, it will be preferable to apply to the Court to *discharge* the order,(y) unless perhaps in cases where a trial, or other important advantage, might be lost if the delay incident to an application to the Court to set aside the order were incurred, in which case, after a respectful protest against the order, and intimation to the defendant's attorney of the necessity and ground for immediately proceeding in the action, the plaintiff might so proceed.(z)

(x) *Kirby v. Ellier*, 2 Crompt. & M. 315. In that case the defendant obtained another order for setting aside the declaration with costs, and then the plaintiff obtained a rule for setting aside both the orders, and the defendant, on the recommendation of the Court, gave up the costs under the second order, and the action was compromised.

(y) See the result of the last case in note (x), *supra*.

(z) In a case where a rule nisi had in K. B. been drawn up by the defendant's counsel without the express authority of the Court, concluding "In the meantime all proceedings to be stayed," and the plaintiff nevertheless proceeded in the action, the Court afterwards, on *discharging* the rule said, that the plaintiff had a right so to proceed, although at his peril and expense, in case the rule had been made absolute. MS.

So if an order has been obtained by misrepresentation, as by falsely stating to a judge's clerk that the judge directed certain terms, which he did not, and thereupon the clerk drew up and delivered out such order, the same may be treated as a nullity without moving the Court to set it aside. (a) It seems also that a single judge at chambers has no power to interfere with the *Nisi Prius* cause list to be tried before another judge in directing the order of trial, but the proper judge on the circuit, or the Chief Justice at his chambers, on application, directs the time of trial. (b) Supposing that inadvertently an order of the Court or a judge should be obtained by surprise, it would seem that the cause might nevertheless be tried without regarding such order.

An attachment will not lie for disobedience to a judge's order until it has been made a rule of Court, although the order has been acquiesced in and acted upon. (c) And a judge's order made in vacation cannot be made a rule of Court before the following term. (d) But by rule, Mich. T. 3 W. 4, A. D. 1832, and Hil. T. 3 W. 4, A. D. 1833, if a judge's order to return mesne or final process be made and served in vacation, and not promptly or duly obeyed, it may afterwards be made a rule of Court in next term, and an attachment shall go, although in the mean time there may have been an attempt to purge the contempt by *subsequent* performance.

11. Judge's order, how enforced,

Unless a judge's order has been made under the authority of a statute and thereby declared to be final, or it be previously agreed by the parties that it shall be final, either party dissatisfied with his decision may, it has been supposed, as *of right*, within a reasonable time, move the full Court "to set aside" or "rescind such order," (e) either entirely or partially, as to costs, or to set aside the same, and proceedings taken in pursuance. But in a recent case the Court of King's Bench intimated that where a *discretionary* jurisdiction has been delegated to a judge (as in the instance of allowing an amendment of a declaration by the introduction of new counts in an action of *quare impedit* at the suit of the king) and he has decided, it by no means follows that a party can move the Court to set aside his order. (f)

12. Motions to Court to set aside a judge's order.

(a) *Woosnam v. Price*, 1 Crompt. & Mees. Rep. 352.

(b) *Johnson v. The Coke and Gas Light Company*, 7 Taunt. 390; *Malthy v. Moses*, 1 Chitty, R. 489, post, 41.

(c) *Baker v. Rye*, 1 Dowl. Pr. C. 689; *Ex parte Lawrence*, 2 id. 231.

(d) *The King v. Price*, 2 Crompt. & M. 212; 2 Dowl. Pr. C. 233.

(e) Per Tindal, C. J. in *Doe dem. Prescott v. Roe*, 9 Bing. 105, 6; 1 Dowl. Pr. C. 274; and see 4 Burr, 2569; *James v.*

Kirk, 1 Chit. Rep. 246; 9 Bing. 104; *Foster v. Burton*, 3 Tyrw. 380. And it will be observed that the concluding part of sect. 4 of the Juriespleader Act, 1 & 2 W. 4, c. 58, appears to suppose that, in general, "all orders of a judge may be rescinded or altered by the Court."

(f) Per Denman, C. J. and Patteson, J. in *Rex v. Archbishop of York and others*, 1 Adol. & El. 397; 3 Nev. & Man. 453; S. C. post, 35.

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And when a judge's order is set aside, as the matter objected to was the decision or act of a judge, it is not the practice to award any costs of the motion in favour of the party who succeeds in the reversal. (g) The recent interpleader act, 1 & 2 W. 4, c. 58, s. 4, in *express* terms, subjects an order under the authority of that act of a *single* judge not *sitting in open Court* to be rescinded or altered by this Court. (h) In general such application should be made as early as practicable in the next term, and before the opponent has taken any proceedings in that term upon such order. (i) And when a judge's order has been acquiesced in, it is as valid as any act of the Court. (k) But even a delay of an intervening term on the part of a plaintiff, complaining of an order, who has not since taken proceedings in the cause, nor has the defendant taken any proceedings upon the order, might possibly be excused, as by the continuing illness of the plaintiff's attorney; (l) of course in support of a motion of that description the applicant must shew some sufficient objection, (m) such as that the order was to set aside a sham demurrer, which a judge at chambers cannot make; (n) and if the ground of the application be not apparent on the face of the order itself, there should be an *affidavit* fully stating what occurred before the judge and all extrinsic facts. In practice, it is most respectful to make the motion, if time will allow, when the judge is present, and he does not interfere unless called upon to explain, and the rest of the judges hear and give effect to the motion by granting or refusing a rule nisi with anxious impartiality, as if the order had not been made by a judge.

If the judge's order has been made without jurisdiction, or he has come to a conclusion against the propriety of which the party thinks fit to complain, he may move the Court in banc to set it aside without first making the same a rule of Court, (o) as is requisite in the case of motions to set aside an award made under a submission and judge's order, (o) and as is also necessary before a motion to the Court to discharge an order for suing in

(g) *Hargrave v. Holden*, 3 Dowl. 176.

(h) See the act, *ante*, vol. ii. 345, note (s). From the expression, "not sitting in open Court," it should seem that when an order under this act has been made in the Practice Court it could not be rescinded.

(i) Per Tindal, C. J. in *D. D. Prescott v. Roe*, 9 Bing. 105, 6; 1 Dowl. Pr. C. 274, and see 4 Burr, 2569; *James v. Kirk*, 1 Chit. Rep. 246; *Foster v. Barton*, 3 Tyrw. 380.

(k) *Wood v. Plant*, 1 Taunt. 47.

(l) *Huges v. Brand*, 2 Dowl. Pr. C.

131, *sed quære*, for although illness was sworn to, Bayley, J. said, "the Court is not satisfied about the excuse for the delay."

(m) Per Abbott, C. J. *James v. Kirk*, 1 Chitty, R. 248.

(n) *Foster v. Barton*, 3 Tyr. Rep. 380.

(o) *Spicer v. Todd*, 2 Tyr. R. 172; but see *contra Haues v. Johnson*, 1 Young & J. 10, where the Court inclined to think that a judge's order allowing a plaintiff to sue *in forma pauperis* must be made a rule of Court before the Court will entertain a motion to discharge it.

forma pauperis. (p) And it seems that the propriety of a judge's order will not be suffered to be impeached *collaterally* upon another motion or proceeding, but there must be a direct and distinct motion to the Court for a rule to shew cause why such order should not be set aside, for otherwise the Court will not attend to any objection; (q) and it seems to be a rule not only not to allow costs when a judge's order has upon a direct application been set aside, but it is also usual when a practitioner has acted upon the supposed sufficiency of a judge's decision in another case, but which the Court think incorrect in point of law, to set aside the proceeding expressly without costs, thus testifying the respect due to any judge's decision. (r)

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When an order has been made under an express power given by statute it is sometimes conclusive and is not subject to review unless an appeal to the Court be expressly or impliedly given. Thus a judge's order made in vacation under the Lords' Act is final and not subject to the review of the Court, because that intention of the legislature is apparent on the face of the act, (s) and the decision of a judge of assize on remanding a prisoner under the same statute is final up to the time of remanding. (t) But the decision of a single judge under the interpleader act, 1 & 2 W. 4, c. 58, although in s. 2 declared to be final, may by sect 4, if made by a judge not sitting *in open Court*, (*i. e.* not sitting in banc or in the Practice Court,) be rescinded or altered by the Court in like manner "as other orders made by a single judge." It seems questionable, however, whether the decision of a judge at chambers as to *amendments* of pleadings within the limits of his *discretionary power* over such amendments can be interfered with by the Court, (u) or his order for striking out a second or subsequent count under the Pleading Rules of Hil. T. 1834; and as 3 & 4 W. 4, c. 42, s. 23, gives a judge *at nisi prius* an unqualified discretion in *refusing* an amendment, though there is an appeal to the Court, when he has *allowed* an amendment, yet the Court cannot in the former case interfere to examine the propriety of such *refusal*. (x)

13. What orders of a judge are conclusive and cannot be set aside.

(p) *Hawes v. Johnson*, 1 Young & J. 10; and see *Hargrave v. Holden*, 3 Dowl. 176; rule 34, n. (g).

(q) *Urquhart v. Deck*, 3 Dowl. 19.

(r) *Wigley v. Tomlins*, 8 Dowl. 9; *Nurse v. Gething*, *id.* 158.

(s) 32 G. 2, c. 28, s. 15; *Leuch v. Fargiter*, Dougl. 68; 3 J. B. Moore, 64,

65.

(t) *Briggs v. Sharp*, 6 Bing. 517.

(u) Per Denman, C. J. and Patteson, J. in *Re v. Archbishop of York and others*, 3 Nev. & Man. 453, and 1 Adol. & El. 397, S.C.

(x) *Doc v. Errington*, 3 Nev. & Man. 616.

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IV. OF THE
MASTER, &c.

IV. Authority of the MASTER of King's Bench on the civil side, and of the Master on the crown side ; and of Prothonotaries of C. P. and of Master of Exchequer.

1. Master on civil side of K. B.

Fourth, The Offices of the Masters and Prothonotaries.

In relief of each of the three Courts of a part of the burthen of business, some branches thereof are delegated to an officer or officers of each Court, called the Master or Prothonotary, and whose functions are somewhat analogous to those of a Master in Chancery who acts in aid of the Court of Chancery.

On the plea or civil side of the King's Bench, the Master, now Mr. Le Blanc, is a most important officer, transacting much of certain parts of the business of the Court, and who is the secondary or deputy to the chief clerk, and has able assistants under him. (y.) In consequence of the great experience of this important officer, and his ability to state, not only the course of practice, but also instances when or not a similar rule or proceeding has been permitted or refused, *the judges frequently make inquiries of him* upon such subjects when connected with the *practice* on the civil side of the Court. (z.) Though it should seem that where the construction of a statute or an express written rule of the Court is involved, no weight should be attached to the report of any officer of the Court. (a.) In general, especially towards the end of a term, when there are disputed rules upon matters of account or practice, or relating to the conduct of an attorney, and founded upon or opposed by long or conflicting affidavits, and when the Court perceive that it is probable that further affidavits and perhaps personal examination of the parties may elucidate the facts, it is very usual to refer the matter to the master, either generally or with a direction to him to report the result and his opinion thereon to the Court. As it is an established rule in Court practice not to receive supplementary affidavits on shewing cause against a rule nisi, at least without leave of the Court, and which is rarely given, (b.) it is frequently advantageous to one, if not both the parties, that the matter in dispute should be thus referred, because the master will in general receive further affidavits on each side and examine the parties viva voce, until every source of information has been exhausted. On these occasions the master or prothonotary is frequently attended by counsel on behalf of one or of both the parties, and considerable

(y) Tidd, 43.

(z) See a late instance on application of *Pitt v. —*, 3 Nev. & Mann, 566, and see *Bugden v. Burr*, 10 Bar. & Cres. 457 ; and *Cook v. Allen*, 3 Tyrw. 380 ; But see the objections of Hullock, B. to the Court taking the statements of their officers as the evidence of the practice of the particular Court, *Anonymous Case*, Price Gen. Prac. 84, 85, and see the case,

post, chap. 2 ; and also see id. note *.* and *Bulkely v. Smith*, 1 Price's Exch. Cas. of the Court of Exchequer having strongly reprobated any conventional course of practice amongst the officers of a Court.

(a) *Semble*, see observations of Hullock, B. referred to in the last note, and post, second chapter.

(b) Tidd, 493, 496, 501 ; *Salloway v. Whorewood*, 2 Salk, 461.

experience has satisfied me that whilst this office is filled by so able, so sensible, and so honorable a personage as at present, justice is as efficiently administered by him as it would be by the judges.

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Either of the parties may by his counsel move the Court for the master's or prothonotary's report, and may after it has been read object and argue upon any part thereof. (c) The master or prothonotary usually, as matter of courtesy, allows the counsel to see his report or a copy, before it is publicly read, so as thereby the better to enable them to observe thereon to the Court.

As regards *matters of account*, and especially the ascertaining what is due for principal and interest on bills of exchange, promissory notes, or in actions of covenant for rent, or arrears of annuity, &c. after judgment by default, *references to the master* of King's Bench, or Exchequer, or to a prothonotary in the Common Pleas, constitute a very extensive description of business, decided upon by those officers without the intervention of a jury or the Court, and which will hereafter be fully considered. The master also exercises by himself and deputies the very extensive and important ministerial office of *taxing and allowing the costs*, as well in original actions as on motions, and depending sometimes on the difficult construction of various acts of parliament allowing costs; and as well before as since the 1 W. 4, c. 22, even the expense of bringing over witnesses from abroad, and of subsisting them here, (though not for their loss of time,) may be allowed at the discretion of the master or prothonotary of King's Bench, Common Pleas, or Exchequer, subject to the review of the Court; (d) and with respect to the allowance of the expenses of numerous witnesses, much is in the discretion of the master, and the Court will not interfere with his decision unless *mala fides* be shewn in the successful party, as an intention unnecessarily to increase the costs, when the Court will, on affidavit and motion, sometimes interfere. (e)

The Court frequently, especially towards the end of the terms, and on the last day of each, when all the matters before the Court cannot otherwise be disposed of, and especially when the facts are contradicted and require further affidavits and inquiry, suggest to the parties the expediency of a reference of the matter to the master of the Court, or sometimes to a barrister; and the former suggestion is usually acceded to, or the motion will be enlarged and not disposed of until the next term. But this jurisdiction is *entirely voluntary*, and either

(c) Tidd, 486.

(d) *Macaulpine v. Poules*, 3 Tyrw. 371.

(e) *Thomas v. Saunders and another*, 3 Nev. & Man. 572.

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party may refuse his assent. In questions of mere practice such a reference is proper; but in matters of law connected with facts, it may be otherwise; and when the parties wish to have the full consideration and judgment of the four judges upon the matter, it may be the duty of their counsel not to consent to a reference to the master, although the consequence may be that the Court, attributable to the press of business on the last day of the term, and the impracticability of their deciding upon all the unheard motions, will enlarge the rule, in which case it will stand in the list of peremptories to be heard in the early part of the next term. It is an important point in the practice of a skilful counsel to bring on all contested motions, especially when it is probable they will, when deliberately heard and considered, be determined in his favour, and thus expedite the proceedings of his client, on an *early day* in the term; but it frequently occurs that the opposing party will effectually counteract that endeavour, a part of practice which will be more particularly condemned in the chapter on motions.

2. Master of
Crown Office.

The *Master* of the Crown Office transacts a considerable portion of business on the crown or criminal side of the Court, and where a party has been taken upon an attachment, such officer examines him on interrogatories, and reports thereon to the Court. (*f*) So it is not unfrequent, after conviction upon an indictment or information, for the Court to direct the defendant to go before the *master*; which imports an authority to the master to ascertain the prosecutor's costs, and direct the defendant to pay the same.

3. Prothono-
taries in C. P.

In the Common Pleas a great variety of matters arising out of causes are referred to the Prothonotaries, who in that respect resemble the Master on the plea side of the King's Bench, and they make reports thereon to the Court; and also on the examination of persons in contempt on interrogatories, and report thereupon to the Court. (*g*) But in the Common Pleas, where a complaint had been made against an officer of the Court, the judges have declared that they will not refer it to the prothonotaries for examination, but will examine it themselves. (*h*) In the King's Bench, however, it is very frequent to refer motions imputing misconduct to an attorney to the master,

(*f*) Tidd, 481, 2.

(*g*) Tidd, 47, 481, 482; where see the difference in the practice of K. B. and C. P. And see the strong observations of Hullock, B., against referring a question of practice, or delegating the jurisdiction

of the judges to the decision of their officers, *Anonymous case*, Price Gen. Pr. 84, 85, and stated *post*, 2d chap.

(*h*) *Johnson v. Smith*, 1 Hen. Bla. 105; Tidd, 58.

but with a reservation that he shall report to the Court, who thereupon pronounce a rule absolute that may affect the character or future practice of such attorney.

CHAP. I.
IV. OF THE
MASTER, &c.

In the Exchequer, the Deputy of the Clerk of the Pleas (now Thomas Dax, Esq.) is called *the Master*, and his business is to take minutes of what is done in Court, draw up rules, *make reports on matters referred to him*, and to tax bills of costs, draw up rules for the allowance of bail, and he *signs process* and judgments. (i) The 2 & 3 W. 4, c. 110, s. 1, enacts, "that the said Thomas Dax, and Kenrick Collett, and Edmund Walker, shall perform the duties of master and prothonotary;" and the chief baron and other barons are by section 5 authorized from time to time to order and direct the hours and manner in which the several officers of the Court shall give their attendance and conduct the business in their several departments.

4. Master in
the Exchequer.

Fifthly. Jurisdiction of a Judge at Nisi Prius and on the Circuit.

On the trial of issues in fact, very frequently difficult questions upon the admissibility of *evidence*, and in general upon other matters of *law*, as well as upon the application of law to complicated facts arise, and therefore, in certain very difficult cases, a trial at bar before four of the judges of the Court in which the issue has been joined may be had; yet, *in general*, trials at nisi prius can only be had before a *single judge*, although it is obvious that the assistance of other judges is then frequently even more requisite than upon the argument of a mere question of law in full Court. This defect in the administration of justice is attributable to the necessity for the fifteen judges separating to try civil causes and criminal prosecutions in different counties and circuits at the same time.

V. Of the
jurisdiction of a
Judge at Nisi
Prius in term
or vacation in
London or Mid-
dlesex, and on
the circuits.

Trials of *issues in fact* by a *jury* take place before a single judge in *London and Middlesex*, as well in and during the terms, as in the four vacations after term; and also on the *circuits* throughout England and Wales after Hilary and Trinity terms, technically called *the issuable terms*. In order to expedite actions against actual prisoners, and in other suits, principally for debts, it was deemed essential that trials of issues should take place in and during each of the four terms on certain parts of days, and the consequence was, that usually the chief justice of each Court (although a puisne judge might

1. In Middle-
sex and London
in and after
term.

(i) Tidd, 54 to 56, Supplement, 1833; and see Dax's Exch. 2d ed. 4 and 10.

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&c.

at the request of the chief justice try causes for him (*k*) was at those times obliged to leave the full Court to attend at nisi prius, and either break up the Court sitting at Westminster, or proceed elsewhere; thereby, in either case, greatly impeding the proper business to be transacted in banc during the terms. This injurious practice has been in some measure improved by the appointment of a fifth judge; (*l*) and by section 4 of the same act, which enables a judge or baron of *either Court* to try causes at nisi prius issuing out of either Court; so that in no case is it essential that either of the chief justices or the chief baron should sit at nisi prius in the terms, unless the state of the business in banc will permit him to do so without injury to the suitors. But still great inconvenience to *counsel* and *attornies* is occasioned in consequence of the impracticability of their being present at the same time in two different and sometimes distant places, and it is very desirable that *there should be no sittings in the terms*, but that the causes that might otherwise be then disposed of, should be tried on the first or second entire days immediately after the term, and have judgment of the term if proper, and be declared as effectual against prisoners as if tried during the terms.

The 11 Geo. 4 and 1 Will. 4, c. 70, s. 7, enacts, that when the alteration of the terms under section 6 of the act shall have taken effect, not more than twenty four days, exclusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than six days, exclusive of Sundays, after any Easter term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in London and Middlesex for the trial of issues on fact arising in any of the said Courts: provided, that if any trial *at bar* shall be directed by any of the said Courts, it shall be competent to the judges of such Court to appoint such day or days for the trial thereof as they shall think fit, and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term: provided also, that a day or days may be specially appointed at any time, not being within such twenty four days, for the trial of any cause at nisi prius, with the consent of the parties thereto, their counsel or attornies. (*m*)

(*k*) 1 Geo. 4, c. 55, s. 2.

(*l*) 11 Geo. 4 and 1 Will. 4, c. 70, s. 1 and 4.

(*m*) It will be observed, that in consequence of this latter enactment Lord

Lyndhurst appointed the cause of *De Beauvoir v. Rhodes* to be tried, and the same was tried on 31st October and 1st November, 1834.

Although the *Court* in *banc* has jurisdiction not only to grant but to discharge rules for the trial of a cause by special jury, and upon affidavits they will hear and decide upon a rule nisi for discharging a rule obtained by a defendant for a special jury even on the very morning of the day, when, if such rule should be discharged, the plaintiff might try the cause by a common jury, yet the Court, and still less a single judge, has no jurisdiction to interfere, or at least will not interfere, with the cause list at nisi prius by forwarding or postponing a particular cause or otherwise, but the controul over the same is exclusively vested in the judge who is to try the causes; (*n*) and therefore the Courts refuse to give directions as to the order in which a special jury cause shall be tried, although the rule for a special jury had been obtained for delay, (*n*) and the judges at chambers refuse applications for restoring causes struck out of the list, (*o*) for the application should be made to the chief justice at his chambers. And it is erroneous to apply to the Court in *banc* to rectify or alter the terms of a *postea* or the entry of the verdict or finding of the jury, but the application must be made to the judge who tried the cause to correct the verdict according to his notes. (*p*)

We have just seen the exclusive power and controul of the judges of nisi prius over the nisi prius list of causes and the records sent from the Courts to be tried before him. (*q*) The judges upon their circuits act by virtue of five several authorities; first, the commission of the peace; second, a commission of oyer and terminer; third, a commission of general gaol delivery; fourth, a commission of assize, for the trial of landed disputes; and fifth, their authority at *nisi prius*; the commission of assize being annexed to the office of justice of assize by the statute of Westminster 2, (13 Edw. 1, c. 30,) which empowers the judges to try all questions of fact issuing out of the Courts at Westminster; (*r*) and the 3 Geo. 4, c. 10, authorizes them to open the commission on the day after the appointed day, or if that should be a Sunday, even on the succeeding day. The powers of the judges on the circuits have been considerably extended by several modern enactments.

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&c.

2. The Court or a single judge at chambers will not interfere with the nisi prius cause list.

3. On the circuit, the different powers of a judge.

(*n*) *Johnson v. The Coke and Gas Light Company*, 7 Taunt. 390; *Maltby v. Moses*, 1 Chit. R. 489, *ante*, 33.

(*o*) *Jacob v. Rule*, 1 Dowl. Pr. C. 349.
(*p*) *Iles v. Turner*, Exch. Mich. T. 1834; 9 Leg. Ob. 237.

(*q*) *Supra*, this page.

(*r*) *Bullock v. Parsons*, 2 Salk. 454; 3 Bla. Com. 59; Tidd. 41. See the forms of the criminal commission in 4 Chitty's Crim. Law, and of all the commissions at the Rolls in Rolls Yard, Chancery Lane.

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NISI PRIUS,
&c.

Before the 9 G. 4, c. 55, s. 5, the powers of a judge at Nisi Prius, or on the circuit, were limited, and it was decided that even in an undefended cause, and before the trial, a judge could not on the circuit amend any mistake, or make any order in a cause, unless he was a judge of the Court out of which the Nisi Prius record had issued. (r) But the above act enacts, (s) that it shall be lawful for the judges of each of the superior Courts at Westminster, and each and every or any one of them, during their respective circuits for taking the assizes, *to grant such and the like summonses, and make such and the like orders in all actions and prosecutions* which are or shall be depending in any of his Majesty's Courts of Record at Westminster in which the issue, if brought to trial, would be *to be tried* upon such their respective circuits, as if such justices were respectively judges of the Court in which such actions or prosecutions are or shall be depending, although such respective justices of the Court of King's Bench and Common Pleas, and Barons of the Exchequer, and justices of Chester, or any of them, may not be judges of the Court in which such actions or prosecutions are or shall be depending, and such summonses and orders shall be of the same force and effect as if such justices were respectively judges of the Court in which such actions or prosecutions are or shall be depending. But the powers given by this act were considered to be strictly confined to those cases in which the issue, if *tried*, could have been *tried* before a judge on the circuit, and therefore where a cause about to be tried on the circuit had been referred to arbitration by an order of nisi prius, and the judge *afterwards* and during the assizes made a second order, *to enable the defendant to give a notice of set-off*, it was holden, that after such order of reference, the judge was *functus officio*, and the jurisdiction entirely delegated to the arbitrator, and that the statute did not authorize the second order. (t)

Amendments on
the circuit.

As respects amendments immediately *before* a trial on the circuit, it was formerly supposed that a judge at Nisi Prius ought not to permit an amendment of a material allegation; thus, in an action on a bond, (u) where counsel moved at Nisi Prius to put off the trial in order to amend the declaration by omitting a profert of the bond, and alleging that the bond was in the possession of the defendant, Lord Ellenborough refused the ap-

(r) *Halhead v. Abrahams*, 3 Taunt. 80; Bagley Ch. Pr. 6.

(s) See Chitty's Col. Stat. 734, 735.

(t) *Ashworth v. Heathcock*, 6 Bing. 596; 4 Moore & P. 396, S. C.

(u) *Pain v. Buskin*, 1 Stark. Rep. 174.

plication, observing that it should have been made earlier and at chambers, and that if a party wil allege possession of that which he has not, he must take the consequences; and that the alteration proposed was matter of material allegation, and not the subject of amendment at Nisi Prius. (x) But the practice is now otherwise, and the judge may, independently of the 9 G. 4, c. 15, permit an amendment in the pleadings at any instant *before* the jury has been sworn to try the cause, unless it be manifest that the defence on the *merits* would be thereby prejudiced. (y) In a recent case, (z) in an action of assumpsit on the money counts, upon a summons attended by counsel immediately before the trial, in the judge's room, Lord Tenterden allowed several special counts on foreign bills of exchange, alleged to have been paid *supra* protest, to be *considered as added to the record*, and made an order that if the Court should thereafter be of opinion that the plaintiff could not have recovered upon the common counts, the defendant should have the costs up to the time of trial, and that the plaintiff should take the verdict on the special counts; and the cause was immediately afterwards tried.

The 9 G. 4, c. 15, gives *any* judge of *any* Court power *during* the trial to amend any variance between any *written* document and the record; and the 3 & 4 W. 4, c. 42, s. 23, extends such power to *all* variances from the record, "as well *in verbal* as written evidence, in any particular, *in the judgment of the Court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence*; (a) but it is *discretionary to permit* an amendment, and if *refused*, there is no appeal; though when *permitted*, express power to appeal to the Court *in banc* is reserved to the party who alleges he has been prejudiced by the amendment.

(x) *Pain v. Buskin*, 1 Stark. 174; and see also Tidd, 8th ed. 53.

(y) *Murphy v. Marlow*, 1 Camp. 57.

(z) *Reid v. Smart*, K. B. Sittings at Guildhall after Hil. T. 1828, Chitty for plaintiff and Pollock for defendant; see Chitty's Col. Stat. 735, note (b); but see *Pain v. Buskin*, 1 Starkie's R. 74. With respect to the exercise of the powers of amendment under the 9 G. 4, c. 42, see *post*, the Chapter on Trials.

(a) These terms must have been intended only to preclude an amendment which would deprive the opponent from availing himself of a *just* defence or answer

on the *merits*; because of course every amendment of what would otherwise be a *fatal* variance, deprives a defendant of his *formal* and *technical* defence on that point. *Quare*, therefore, whether the refusal in *Doe d. Errington*, 3 Nov. & Man. 646, to permit an amendment by introducing a separate demise in the declaration in ejectment, in lieu of a *joint* demise, and which refusal gave effect to a *mere formal* and *technical* defence, accorded with the spirit of this enactment; and see observations of Parke, J., in *Hanbury v. Ella*, 1 Adol. & El. 64, 65, and see *post* more fully.

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&c.

The decision of a judge at Nisi Prius, either refusing or permitting an amendment *during* the trial, in case of a variance between the record and any *written* document, under the 9 G. 4, c. 15, was decided to be conclusive, and that the Court above could not review the propriety of his decision. (*b*) And although the subsequent statute, 3 & 4 W. 4, c. 42, s. 23, (which gives extended powers of amendment pending a trial,) expressly gives power to a party dissatisfied with the judge's *allowance* of an amendment, to apply to the Court above for a new trial upon that ground; and in case the Court should think such amendment improper, then a new trial is to be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet; yet as the statute gives no appeal against a judge's *refusal to allow an amendment* at Nisi Prius, he has an *uncontrolled discretion*, with which the Court in banc will not interfere. (*c*) It is obvious, therefore, that a judge should in general permit an amendment, unless it be manifest that the defendant or the plaintiff would be prejudiced in the conduct of his *just* and *meritorious* right or defence, and not refuse an amendment merely because it would defeat an *unjust* or mere formal objection; (*d*) the more especially because the right of a plaintiff to vary the statement of his cause of action in *several counts*, was taken away expressly on the ground that the judges on trials *would liberally exercise the power to permit amendments*, and the new rules of pleading would operate most unjustly unless amendments be *uniformly permitted when justice requires*.

A judge at Nisi Prius, however, has no jurisdiction to set aside or otherwise avoid the effect of a release pleaded puis darrien continuance, or produced at the trial, either on the ground of fraud or otherwise; (*e*) and indeed no proceedings at Nisi Prius can ever take place upon a plea puis darrien con-

(*b*) *Parks v Edge*, 1 Crompt. & M. 429.

(*c*) *Doe v. Errington*, 3 Nev. & Man. 646. This is a great defect in the act, because, if in the hurry of Nisi Prius the judge should misapprehend the nature or effect of the proposed amendment and refuse it, he would perhaps be the first person to regret his decision, and that he has not power to concur with the Court above in permitting an amendment. In a cause tried before Lord Tenterden at Guildhall, and in which his lordship refused an amendment in a very unimportant variance, merely because he considered it proper that the attorney should be punished for his blunder, it turned out that in consequence of such refusal to

amend, and of the delay before a second action could be tried, the defendant, who before would have paid, became insolvent, and the attorney, on being sued for his negligence, also became insolvent, and the *unfortunate plaintiff* only was the sufferer, and his bankruptcy ensued. Besides, it may happen, in course of time, that there may be a judge who might, in actions for political libels, or other cases which he would not be disposed to favour, refuse to exercise such discretionary power, though perhaps justice required he should do so.

(*d*) See observations of Parke, J., in *Hambury v. Ella*, 1 Adol. & El. 645.

(*e*) *Alder v. George*, 1 Campb. 392.

tinuance, if regularly supported by affidavit; but the trial is *instanter* suspended, and the future proceedings take place in bank. (f)

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&c.

Practice of
summons and
order on the
circuit.

The practice by *summons* and order, when that mode of procedure is adopted on the circuits, varies in no substantial respect from the practice at a judge's chambers in town. (g) Thus an affidavit, if the nature of the case require, is made on the part of the applicant, and a summons obtained from the judge, as to show cause at the judge's lodging the next morning at eight o'clock, or some other hour, before the judge goes into Court, why an amendment should not take place in the record; copies of the affidavit and of the summons are then immediately, on the same evening, served on the opponent, who, if considered expedient, makes a short affidavit in answer, and then, at the appointed hour, the two attornies attend by their attornies, and by counsel, if any difficulty occur, or it be deemed essential to quote authorities; and the judge makes or refuses his summons. If the amendment be considerable, so as to render it impracticable to alter the record before the cause in ordinary course comes on for trial, the judge may, perhaps, at least by consent, order that the amendment shall be *considered* as if it had been already made and added to the record, and the cause may be tried in the previous state of the record. (h)

The 1 W. 4, c. 70, s. 38, (enacted 23d July, 1830,) authorizes a judge immediately after a trial of an action of *ejectment* before him, to certify that an *execution may issue immediately* and before the next term; (i) and the subsequent act, 1 W. 4, c. 7, s. 12, (enacted 11th March, 1831,) extended such power of certifying to *all* actions. (j)

The 11 G. 2, c. 19, s. 17, where justices of the peace have ordered possession to be given to a landlord of premises deserted by a tenant, enacts, "that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises are situate, and who are thereby respectively empowered to order restitution to be made to such tenant, together with his expenses and costs, to be paid by the lessor or landlord, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding £5 for the frivolous appeal."

(f) 1 Chitty on Pleading, 699, 700.

(g) Bagley's Prac. Cham. 5, 6.

(h) *Reid v. Smart*, see n. (z), *ante*, 43.

(i) See the cases as to the exercise of this power, *post*, and Chitty's Summary Prac. 167, 168.

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IV. SHERIFFS
AND DEPUTIES.

VI. SHERIFFS
and their DEPU-
TIES, and of
their judicial as
well as ministe-
rial functions as
officers of the
Court.

Sixthly, Jurisdiction and Practice of each Sheriff and his Deputy.

Sixthly, The Sheriff in each county of England has immemorially been considered a *ministerial* officer of the superior Courts in executing process and obeying its rules, and is at common law subject to its jurisdiction in all matters touching his office; and by statute he is liable for his own or his officers' extortion or other misconduct under colour of his office, (k) and there are rules of Court prescribing some of the duties of the sheriff; (l) and the 11 G. 4 and 1 W. 4, c. 70, impliedly extends these liabilities to the sheriffs of the Welsh counties, now bound to execute the direct process of the Courts at Westminster. And the Uniformity of Process Act, 2 W. 4, c. 39, s. 15, authorizes the Court in term time, and a single judge in vacation, to make a rule or order for the immediate return in vacation of any process mesne or final, and which enactment is further enforced by rule of M. T. 1832; and R. H. 2 W. 4, rule 11 & 12, direct, that when a rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open, and the officer with whom it is filed shall indorse the day and hour when it was filed. A rule also was made in the same term requiring the sheriff or other officer or person within six days after executing a writ of *capias* to indorse the true day of executing the same.

Sheriff's power
as a judicial
officer.

But until recently, although a sheriff *might* preside as judge in his County Court in actions therein for debts under 40s., or by justices to any amount, and also might in person, and actually *did* by his under-sheriff preside and direct a jury in executing all writs of *inquiry of damages*, and in executing writs of *elegit* before a jury; yet the 8 & 9 W. 3, c. 11, s. 1, gave him no authority to preside before a jury in executing an inquiry suggesting breaches under that statute; nor in any case had he or his under-sheriff jurisdiction to preside on the *trial of an issue or issues of facts*, until the 3 & 4 W. 4, c. 42, materially extended his powers in those respects. The 16th

(k) On *mesne* process, 23 Hen. 6. c. 9; on *final* process, 29 Eliz. c. 4; 3 G. 1, c. 15; generally, 32 G. 2, c. 28, s. 11, 12; 7 G. 3, c. 29; 43 G. 3, c. 46, s. 5; Chit. Col. Stat. tit. Extortion.

(l) Thus R. E. 15 Car. 2, required every sheriff to appoint a sufficient deputy, and required every sheriff or his deputy to give *personal attendance* in Westminster Hall every day during term, and the same rule prohibited the issuing blank warrants upon pain of severe punishment. R. M. 1654, s. 2, prohibited the issuing of a warrant to arrest before

he has received the writ. R. M. 1654, s. 7, required the sheriff to make his returns. R. M. 1654, for prohibiting delay in executing or returning any process or execution. R. M. 1654, s. 2, punished sheriffs guilty of extortion on writs of possession. R. E. 15 Car. 2, punished bailiffs or sheriffs' officers for taking a warrant of attorney from a person in custody without the presence of an attorney on his behalf; and there are several other rules shewing the exercise of a power at common law to make general rules affecting sheriffs and their officers.

section of that act directs, that the truth of breaches suggested under the 8 & 9 W. 3, c. 11, and the assessment of damages thereby sustained, shall be inquired of before *the sheriff*, unless the Court or a judge shall otherwise direct; and the 17th section enacts, that in any action depending in any of the superior Courts for any *debt* or *demand*(*m*) in which the sum sought to be recovered and indorsed on the summons shall not exceed £20, the Court or a judge, if satisfied that the trial will not involve any *difficult* question of *fact* or *law*, may direct that the issues shall be tried before the sheriff of the county where the venue is laid, or any judge of any Court of Record for the recovery of debts in such county. And the 18th section gives the sheriff or his deputy, or the judge of record, power to certify that the defendant ought to have an opportunity of applying to the Court for a new inquiry or trial, (*n*) and also to prevent judgment and execution immediately after the inquiry or trial; and the sheriff, &c. is to have the same *power of amendment* as a judge has upon a trial under the 23d section of the same act. (*o*) But he has no power to certify that the debt is under 40s. so as to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2. (*p*)

The 20th section also directs all sheriffs of England or Wales to *appoint a sufficient deputy*, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of *any process or writ to be directed* to such sheriff. This regulation, concentrating, as it were, the offices of all the sheriffs throughout England and Wales within one mile of the centre of the metropolis, and in the vicinity of all the public law offices, must be attended with great advantages.

Sheriff to appoint a deputy with an office in London.

It is the imperative duty of every sheriff to appoint such London deputy, and if he should neglect, the duty may be enforced by mandamus; (*q*) and if any delay or prejudice should arise, the sheriff will be responsible for the loss. (*r*) But it has not been decided whether the delivery of a writ of fieri facias to a sheriff's deputy in London, under 3 & 4 W. 4, c. 42, would bind the goods, in case between the time

(*m*) *Quære*, does this extend to unliquidated damages? See 1 Adol. & Ellis, 24. *Semle*, it does not, 2 Crom. & Mee, 150.

(*n*) See *post* as to trials before the sheriff and under-sheriff, motion for new trial. The sheriff or under-sheriff may nonsuit a plaintiff, 2 Cromp. & Mee, 153. As to the course of proceeding, if under-sheriff withhold his notes of trial, *Metcalf v. Parry*, 3 Dowl. 93; *Thomas v. Edwards*,

1 Cromp. M. & R. 382; *Mansfield v. Breary*, 1 Adol. & Ell. 346; *Johnson v. Willis*, 2 Cromp. & Mee, 428.

(*o*) See *Hill v. Salt*, 2 Cromp. & Mee, 420.

(*p*) *Wardroper v. Richardson*, 1 Adol. & Ellis, 75.

(*q*) *The King v. Sheriff of Lincolnshire*, K. B. 31 Jan. 1835.

(*r*) *Brackenbury v. Laurie*, 3 Dowl. 180.

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of such delivery in London, and the actual receipt of the writ or information of it by the sheriff or his deputy in the country, there should be a *bonâ fide* transfer of the goods; and, therefore, the prudent course will be in all cases, not only to lodge the execution at the deputy's office in London, but also to forward a copy and notice immediately to the under-sheriff in the country, or cause the deputy in London to do so instantly. (s)

Notification of
appointment of
sheriff.

The 3 & 4 W. 4, c. 99, s. 3, regulates the notification in the London Gazette of a person having been duly pricked or nominated a sheriff, and the form of his warrant of appointment, and enables him to act as sheriff upon taking a certain oath, without any patent as theretofore. Section 15 requires such sheriff, by writing signed by him, to nominate and appoint some fit and proper person to be his *under-sheriff*, and prisoners, writs and processes are to be transferred to the new sheriff by the out-going sheriff's delivering to him a true and correct list and account thereof under his hand, with all such particulars as shall be necessary to explain to the in-coming sheriff the several matters intended to be transferred to him; and the in-coming sheriff is thereupon to sign and give a duplicate of such list and account to the out-going sheriff, and to whom the same is to be a good and sufficient discharge of and from all prisoners therein mentioned and transferred to such in-coming sheriff; and in future no indenture is requisite for turning over or transferring prisoners or process to the new sheriff, nor is any writ of discharge now to be issued. The act also contains regulations for auditing the accounts of sheriffs.

Transfer of
process and
prisoners.

Functions of
sheriffs in fact
executed by
deputy.

But sheriffs, being rarely practically acquainted with the law, and still less with the rules of evidence, do not in person preside on the execution of writs of inquiry, or the trial of issues for debts or demands not exceeding £20; nor do they interfere with any of the mere practical duties of their office, but leave the same to be conducted by their *under-sheriff* or *deputy*, who is expressly authorized to preside in executing the inquiry or writ of trial, by 3 & 4 W. 4, c. 42, and who in general is or has been an attorney of experience. As the duties of such deputies, in the character of judges, have been thus of late considerably increased, it behoves them to be better informed generally of the law than perhaps heretofore, and especially so of the existing rules of evidence, and one chapter in this work will be devoted to their assistance.

CHAPTER II.

BY WHAT AUTHORITY THE PRACTICE OF THE COURTS IS REGULATED AND WHY THE REGULATIONS OUGHT TO BE STRICTLY OBSERVED, AND CONSEQUENCES OF DEVIATIONS, &c.

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It will be obvious that however varying the facts of each case, and consequently the *pleadings* in different actions describing them, yet the *practical mode* of conducting the proceedings in a suit from the commencement to its determination may or ought in general, for the sake of certainty, to be the same; nor ought the practical mode of conducting a suit to be so intricate or difficult as to delay or prejudice the *trial of the substantial question on the merits*; and yet it has been objected that such desirable *simplicity* as regards some of the modern enactments, especially in the 2 W. 4, c. 39, appears to have been forgotten. (a)

CHAP. II.
1st, INTRODUCTORY OBSERVATIONS AS TO PRACTICE IN GENERAL, AND AUTHORITIES ON WHICH SAME IS FOUND-
ED.

(a) It is to be feared that the Uniformity of Process Act, 2 W. 4, c. 39, has introduced more technical trifling objec-

tions and rules in respect of irregularities, than were previously known. It is really distressing and prejudicial to the admi-

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OBSERVATIONS,
&c.

Another essential matter to be regarded respecting practice is, that having once been settled it is better to be adhered to than altered on account of any *small* objection, perhaps only occasionally felt, nor found to be very pressingly inconvenient; and, indeed, it will be found that *any* alteration in the law or its practice should be most deliberate and cautious, and not adopted until all its bearings and consequences shall have been fully ascertained and duly appreciated.

Upon what authority the practice stood before the statute 1 W. 4, c. 70.

Before the 1 W. 4, c. 70, the course of proceedings in the superior Courts of law, as well respecting *practice* as *pleading*, was regulated by one of four authorities, viz. first, by *general statutes*; secondly, by *express written rules*; thirdly, by *prior decisions*; and fourthly, by *usage*. The *statutes* in general equally applied to all those Courts, but the *express rules* were made by the judges of *each* Court from time to time, and only applied to the proceedings in that *particular* Court; and the *decisions* and *usages* were principally confined to a particular Court, although sometimes all the Courts promulgated or adopted *similar* rules. Such usages constitute what might be termed the *common law* of the Court, as distinguished from the statutes and written particular rules.

Practice, how regulated by Statutes.

With respect to *statutes*, when they have been intended by the legislature equally to affect the practice in *all* the Courts, it would seem to follow that if the intention of the legislature be *clear* and unambiguous, all the judges of every Court must necessarily adopt a similar construction; (*b*) but if the language of an act (as in the 11 G. 2, c. 17, s. 1, respecting judgments as in case of a nonsuit,) be *capable* of different constructions, then it may occur that each judge, or the majority of each Court, conscientiously deciding according to his oath and deliberate opinion, will come to different conclusions; and hence, even where uniformity of practice has been enjoined by the legislature, yet it will sometimes materially differ in the three Courts, and which accounts for the contrariety in some decisions upon

administration of justice to observe, that upon a writ of *habeas corpus*, mere process to bring a party into Court, four of the most able judges should be equally divided in opinion whether in the printed blank for the residence or description of the defendant in a *habeas corpus* it is necessary to name the county as well as town or parish of residence: *Bosler v. Leay*, 1 Bing. New Cas.

562; and see other embarrassing technicalities, *post*, Chap. V. as to process. Such as the omission of *l* in *Middlesex* having been held fatal in C. P., though not so in the Exchequer.

(*b*) And see the opinion of Mr. Baron Hulloock in Price's Gen. Prac. 81, 85, note *.

matters of practice. (c) When the directions of a general statute are clear and peremptory, all the Courts and every judge are alike bound to give full effect to the statute and have no discretionary power to refuse to set aside a proceeding for irregularity when it has deviated from a form prescribed by the act, as where there has been an omission in process in some matter required by the 2 W. 4, c. 39 and schedule; though when the deviation is merely from a *rule of the Court*, independent of a statute, the Court may modify the regulation and permit an amendment on just terms. (d)

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Sec.

It can scarcely be expected that the legislature, composed principally of persons inexperienced in the forms and practical detail of the technical proceedings in an action at law, should be competent to enact upon *mere matters of form* or the technical parts of practice; and accordingly until recently it was always considered advisable to leave those matters entirely to the judges themselves, who from their daily observations and long experience can best appreciate the expediency of any new measure of that nature. At least, if a statute is to be enacted upon such matters of practice, the same act should give the judges power to *modify* and *alter* the forms, without the trouble, expense, and delay of applying to the legislature; for otherwise, the judges being bound by the form prescribed by a statute without qualification, cannot promulgate a rule of their own for remedying any resulting inconvenience, and which may consequently be suffered to continue, and they are obliged to give unqualified effect to every summons or motion to set aside

Why inexpedient to prescribe rules of practice by statute.

(c) It will be observed that 14 G. 2, c. 17, s. 1, says, "Upon motion made in open Court (*due notice having been given thereof*) to give, &c." Some judges held that the act required a notice of the intended motion before it was made, whilst others thought that the service of the rule nisi was a sufficient compliance with the act. See the contradictory decisions in *Anonymous*, Loft, 265; *Gooch v. Pearson*, 1 Hen. Bl. 527; *Chessell v. Parkin*, 2 Taunt. 48, Tidd, 491, 765; *Dav. Prac.* 76; *Price's Pr.* 281. The rule 63 of Hil. T. 1832, now orders that no previous notice of motion shall be necessary; and yet, on principle, if it had been required, the giving it might have saved the costs of any motion or rule, by the plaintiff's immediately offering a peremptory undertaking; see another instance *Price's Gen. Prac.* 84, note*. So upon the construction

of 12 G. 1, c. 29, as to the time within which a plaintiff may enter an appearance for the defendant *sec. stat.* (or in pursuance of that statute); in K. B. he has only two terms and the vacation of the second term to enter such appearance, *Bugden v. Buer*, 10 Bar. & Cress. 457; but in the Exchequer he has a year, *Cook v. Allen*, 3 Tyr. Rep. 378. But see observations on *Anonymous case*, A. D. 1836. *Price's Gen. Prac.* 34, 35; *post*, 82.

(d) *Post*, *Shirley v. Jacobs*, 5 Moore & S. 67; 3 Dowl. 102, 103, S. C.; *Cooper v. Waller*, *id.* 167, 168. This distinction reminds us of the observation in Wilson's Reports, viz. that a statute is like a powerful tyrant moving down all before him without discrimination, but that the common law is like a nursing parent, correcting only the vices and defects when absolutely pernicious.

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&c.

the proceeding, on account of a deviation from a statute form, and cannot permit an amendment; though if the form had merely been prescribed by a *Rule of Court* they would almost of course permit an amendment. (e) In this respect the Uniformity of Process Act, 2 W. 4, c. 39, imperatively requiring the observance of certain forms, was perhaps a less convenient mode of establishing any course of practice than a regulation left to be settled by the judges, which might from time to time, when found partially inconvenient, be changed at a trifling expense by a new rule; an observation which will perhaps be found to apply to most of the enactments in that act. (f)

By express
written rules of
Court.

With respect to the *express written rules* of each Court for regulating its practice and its *ancient usages*, it has been declared by all the judges in the House of Lords, that "The practice of the Courts below is matter which belongs by law to the exclusive discretion of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to its own government alone, without any appeal or revision by a superior Court. And therefore it was decided that, upon a writ of error to a superior Court, the latter cannot proceed or found its judgment upon the supposed propriety or impropriety of any general or particular rule or order of the Court below, as a rule or order for leave to amend, although the same be returned and appear to be parcel of the record," (g) or "a rule or order for striking out pleas, or granting a new trial." (h) And with reference to a decision in the Privy Council, it should seem questionable whether a Court of Appeal can review or alter a rule or order of an inferior Court abroad, expelling from the bar of their Court a barrister, decided by the same Court (however erroneously) to have misconducted himself. (i) And in a recent case it was held, that the Lord Chancellor, sitting in bankruptcy, has authority in any particular case to make an order altering the practice of the Court of Chancery; and that if a solicitor be committed for not obeying such order, no action

(e) *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68; 3 Dowl. 101, S. C.; *Urquhart v. Dick*, 3 Dowl. 17; *Colles v. Mompeth*, *id.* 23; *Cooper v. Walker*, 3 Dowl. 167; *post*, 54, n. (r).

(f) See more particularly *post*, Chap. V.

(g) Per Tindal, C. J. in *Mellish v. Richardson*, 9 Bing. 126; and *ante*, vol. ii. p. 572, note (k).

(h) *Id.* *ibid.*; *Gutley v. Bishop of Exeter*,

10 Bar. & Cress. 584.

(i) *In re The Justices of Common Pleas at Antigua*, 1 Knapp's R. 267; *R. v. Gray's Inn*, Cowper's R. 339; and *Mitchell's case*, 2 Atk. 173; *King v. Sotherton*, 6 East, 143; *see quare*, for it seems from the course of proceeding in the first case, that if there had been *just cause* in that case, relief might have been obtained in the Court of Appeal.

can be supported against the Chancellor, and he may effectually resist the same under the plea of general issue; (*k*) and the same principle equally applies to any order relative to practice made by all or one of the judges of a Court.

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&c.

Before the recent enactments, it was not usual for the judges of *all* the Courts to meet and concur in altering any discordant practice, by a *general* rule to be observed in *all* the Courts, but the judges of one Court, as occasion arose, without perhaps any avowed communication with those of the other Courts, from time to time made *particular* rules for their own Court, framed according to the best of their judgments, and in many cases depending on the *peculiar process* and practice of that Court, and intended only to be observed therein; and we find that in the Common Pleas it was the special duty of the prothonotaries to draw up general rules for regulating and settling the practice of that Court and proceedings therein, and to certify to the Court in matters of practice when required; (*l*) and although, in progress of time, the other Courts made rules somewhat similar, yet they perhaps varied in some small respect, and each Court alone construed and gave effect to its particular rules, according to what was considered to have been the object and the intent of the Court at the time such rules were pronounced; and, consequently, great variety and even contradiction in the rules and practice of the different Courts prevailed. These inconveniences, resulting in a great measure from the *great variety of forms of process* even in similar cases, nothing but an express statute or *new rule* could prevent; for as we have seen no Court of Error could interpose, and although the inconvenience, or even injustice, might be felt strongly, yet it was an established principle, that for the sake of certainty in practice, each Court should adhere to an express rule, or even ancient usage of its own; and even in Courts of Equity it was considered that a long course of practice in a particular Court is to be as binding as a positive rule or order; (*m*) and in the Ecclesiastical Courts it is a maxim "That *old rules of practice, which are in themselves consonant to reason and analogy, and which have not undergone an authoritative alteration, ought to govern the practice of the Courts at the present day.*" (*n*) And as regards the *usage* of

Introduction of
general rules for
regulating the
practice of *all*
the Courts.

(*k*) *Dicas v. Lord Brougham*, 6 Car. & P. 249.

(*l*) Tidd, 47; and see Mr. Baron Hullock's observations in Price's Prac. of all the Courts, p. 84, 85, note *, upon the inexpediency of deputing to any officer any

influence as regards the practice of the Courts.

(*m*) *Brown v. Bruce*, 2 Meriv. 1.

(*n*) *Durant v. Durant*, 1 Addams's Rep. 114, 118, 123, where see an example in practice.

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&c.

the Courts, it has been held in equity,^(o) that repeated decisions, forming a series of practice, may even amount to the reversal of an order; ^(o) and at law it has been observed, that the *practice* of the Court is the *law* of the Court; and in *Bewdley's case*, a practice of only seven years was allowed to prevail even against an enactment in a statute,^(p) a doctrine, however, which it should seem cannot be sustained, at least when the enactment is capable only of one construction.^(q)

Distinction between a statutory regulation and a rule of Court, that a deviation from the latter may be amended.

Some recent decisions have established an important distinction between the *peremptory effect* of a form or practice enjoined by a *statute*, and one prescribed only by a *rule of Court*; viz. that the former must be precisely observed, and that the Court will not permit *any amendment* of deviating process, except in cases where a statute of limitations would bar the remedy. But a *rule of Court*, (even one of the most modern general rules promulgated under the 14th section of 2 W. 4, c. 39, for the very purpose of thereby the better enforcing that act,) is construed and enforced *less rigidly* than a regulation in the statute itself, and any deviation against the direction of that *rule* may be amended upon payment of costs.^(r) It will, however, be observed, that the decisions of the judges, permitting amendments of deviations in process, &c. from the form prescribed by the Uniformity of Process Act, 2 W. 4, c. 39, "*when a statute of limitations would otherwise bar the remedy*," sufficiently establishes that they have *ample discretionary jurisdiction* and *power* to permit an *amendment* in *every* case, if they think proper to exercise it, and that their resolution on this act, not *in general* to permit

^(o) *Boehm v. De Tastet*, 1 Ves. & B. 327.

^(p) *Bewdley's case*, 2 Stra. 755; 1 P. Wms. 207; 3 Burr. 1755; 8. C. Tidd's Introd. lxxi.; and that doctrine seems to prevail in Scotland, see *Tyson v. Thomas*, McClell. & Young, 127; but see 1 Bla. Com. 76, 77; 1 Chit. Rep. 299 a.

^(q) And see strong observations of Mr. Baron Hulloek's in Price's Prac. of all the Courts, 84, 85, note *.

^(r) *Urquhart v. Dick*, 3 Dowl. 17; *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68; 3 Dowl. 102, 103, S.C.; *Cooper v. Walker*, 3 Dowl. 167, 168; per Parke, B. in *Jackson v. Jackson*, 1 Crompt. M. & R. 139. Per Tindal, C. J. in *Shirley v. Jacobs*, 5 Moore & Scott, 68; 3 Dowl. 103; speaking of an indorsement under the general rule Mich. T. 5 W. 4, "The point was discussed among us in order that an uniform understanding might be come to, and it was ultimately considered that

"non-compliance with a rule of ours ought not to be visited with the same consequences as non-compliance with an act of parliament; but that, at the same time, a person who had not observed so plain a rule, should be called upon to amend on payment of costs." *Sed quare*, for this distinction is rather attributable to a diffidence and reluctance on the part of the judges to enforce their *own acts*, than supported by sound principle, because it will be conceded that the necessity for and expediency of enforcing rules of Court sanctioned by all the judges, and especially when made for the very purpose of enforcing an enactment, is at least as obvious as the necessity for enforcing a statute; and it is equally as essential to enforce the one as the other, with a view to compel certainty and uniformity in practice.

any amendment, is not because the statute has absolutely deprived them of the power to authorize amendments, but merely because they have considered it better not to permit such amendments, in order by the refusal the better to enforce the declared object of the legislature, and, in the language of the 14th section, the more effectually cause the act to be executed. The Courts certainly heretofore permitted most material alterations in and amendments of process, even in a *capias* in proceedings by original.(s)

With respect to *decisions*, they are either upon the construction of a *statute*, or of what is just and reasonable to be done under given circumstances, and what might be termed the common law. (t) It is obvious that when the intention of the legislature is *clearly* to the contrary, no current of decisions can or ought to counteract that intention; (t) but when it is *ambiguous*, then successive uniformity of decisions is usually considered obligatory; and it is the maxim *stare decisis*, (u) because *nihil simul inventum est et perfectum*, and it is most probable that the public or legal practitioners have acted on the faith of such decisions, and it would be inconvenient, without an act of parliament declaratory of the law, and publicly promulgated (long before it is to come into operation,) to change the course of decision. (u) When there are conflicting decisions of a single judge against a decision *in banc*, the latter is to be preferred until overruled in *banc*; and when there are conflicting opinions of equal weight, *i. e.* both of a single judge, or both in *banc*, then the rule seems to be to prefer the last. (x)

By Decisions,
and effect there-
of.

Long *usage* in the practice of the Courts, or of a particular Court, may be considered the common law of the Court; for the acquiescence in constant proceedings, as well by the judges as its experienced officers, denotes that it is reasonable, and has not been found objectionable, because if it had, it would soon have induced an immediate change; the judges of each Court have implied power to alter any inconvenient practice when

How regulated
by Usage, and
effect thereof.

(s) *Carr v. Shaw*, 7 T. R. 299; *Tabrum v. Tenant*, 1 Bos. & Pul. 481; *Stevenson v. Danvers*, 2 Bos. & Pul. 109; *Tidd*, 139; and see cases, *Tidd*, 161.

(t) 1 Bla. Com. 69, 76, 77; 1 Chitty's Rep. 299 a.

(u) *Tyson v. Thomas*, McCl. & Young, 127; *Bewdley's case*, 1 P. Wms. 207,

223; *R. v. Mann*, 2 Stra. 755; *Money v. Leach*, 3 Burr. 1755; *Gombe v. Cuttill*, 3 Bing. 168; *A'Court v. Cross*, *id.* 331; *Snow v. Peacock*, *id.* 412.

(x) Per Alderson, B. in *Duncan v. Grant*, 1 Crompt. M. & R. 384; 4 Tyr. 818, S. C.; and per Parke, B. in *Jackson v. Jackson*, 1 Crompt. M. & R. 439.

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&c.

Objections to
any conventional
practice.

they think fit. (x) And it is important that such usage should be adhered to until *expressly* altered by statute or rule, because otherwise practitioners, relying on the known practice, would be misled if there were any sudden unpromulgated change; (y) and the same principle, indeed, weighs against *any* change, unless imperatively called for by a strong necessity. (y) But the supposition that any usage can prevail against an *explicit act* of parliament would be most unconstitutional; and certainly, notwithstanding some dicta in favor of the doctrine, it cannot have weight, or at least is only applicable to statutes when *ambiguously* expressed, and ought never to fetter the decision of any Court. (z) At all events, before effect should be given to *usage*, the origin and principle of the practice in each office should be carefully examined, for it has occurred that some usages or practices have originated in a highly censurable *conventional course of practice*, fixed by officers, perhaps, rather for their own emolument or convenience, than for the benefit of the suitors; (a) thus, before 1 W. 4, c. 70, for the more effectual administration of justice, and whilst the Exchequer of Pleas was a close Court, having only four attorneys, and their sixteen side clerks, who sat and transacted business in the same room in Lincoln's Inn principally, a conventional course of practice had obtained in the office of Pleas, which was on several occasions *strongly reproved by the Court*. (b) And holidays have been attempted to be established by some officers when called to prove a practice, which were invented merely to obtain personal indulgence, or extra fees for opening the office, even at most urgent seasons of the year. (c)

Inconveniences
resulting from
the great
variety of pro-
cess and rules
before the re-
cent acts 1 W. 4,
c. 70, and 2 W.
4, c. 39.

The great *variety* and *dissimilarity* of process in each Court, whether by Original Writ or Bill of Middlesex or Latitat, or

(x) *Ante*, 52.

(y) *Ante*, 55.

(z) *Tyson v. Thomas*, Mc Clel. & Young, 127; *Combe v. Cuttill*, 3 Bing. 163; *A'Court v. Cross*, *id.* 331; *Snow v. Peacock*, *id.* 412; *Tidd's Prac.* Introd. lxxi. qualifying *Bewdley's case*, 1 P. Wms. 207, 223; *R. v. Mann*, 2 Stra. 753; *Money v. Leach*, 3 Burr. 1753; and see observations of Hullock, B. in an *Anonymous case*, reported in Price's Gen. Prac. 84, 85.

(a) See *Bulkeley v. Smith*, 1 Price's Exch. Cases, and Price's Gen. Prac. 85.

(b) Price's Gen. Prac. 85, in notes, referring to *Bulkeley v. Smith*, 1 Price's Exch. Cas. The consequence was, that formerly, in pleading a title in the Ex-

chequer against the crown, the officers, with a view no doubt to emolument, insisted that every part of every deed, lease and release, &c. must be set out *verbatim*, until Mr. Justice Dampier put an end to that expensive practice. It was also not the practice to engross the pleadings till the record was made up, but to hand over the drafts of pleadings with the pleader's marginal notes, which frequently being only partially erased, disclosed to the opponent the nature of or difficulties in his adversary's case. Nor were counsel's fees for signatures *always paid*.

(c) *Tidd*, 9th ed. 54 to 59, as to holidays now limited.

in proceedings against privileged persons, prisoners, &c. in the Court of *King's Bench*, or by original writ or by *capias ad respondendum*, or *capias quare clausum fregit* or *distringas*, or by writ of privilege by or against officers and other privileged persons in the Court of *Common Pleas*; or the proceeding by *quo minus*, *venire* and *distringas subpœna*, and other process of the Court of *Exchequer*, led to an infinite *variety of regulations*, each perhaps sensible and proper at the time they were made, but nevertheless creating such an accumulation of varieties and nice distinctions that the most cautious practitioner could scarcely take a step in a cause with certainty of being accurate. (d) Formerly also the judges of each Court evinced perhaps too strong a partiality to the rules and practice of their own particular Court, which seemed to forbid improvement; and though in modern times the judges of all the Courts, when they had ascertained that the practice of one Court differed from that of another upon any important point, met and consulted with the judges of such other Court, and they respectively endeavoured to assimilate their practice, and with that view occasionally rescinded their own rules and introduced new regulations, more conducive to the advancement of justice; yet still as these improvements occurred only in a few instances, and there was no act empowering, and in effect *requiring*, the judges of all the Courts to meet and endeavour to concur in getting rid of the inconsistencies and contradictions in the practice of the Courts, the progress to similarity and improvement was consequently slow and partial.

2. But at length the statute passed on 22d July, 1830, in session 11 G. 4 and 1 W. 4, c. 70, intituled "An Act for the more effectual Administration of Justice in England and Wales," was enacted; and section 11 enacts, that in all cases relating to the *practice* of any of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, in matters over which the said Courts have a *common jurisdiction*, (e) or of or relating to the practice of the *Court of Error* therein before mentioned, it *shall be lawful* (f) for the judges of the said Courts jointly, or any eight or more of them, including the *chiefs of each Court*, to make *general rules* and orders for regulating the *proceedings* of

BY RECENT
ACTS AND
RULES.

2. The first modern act, 1 W. 4, c. 70, s. 11, for the general improvement in the practice, directing the judges of all the Courts to make general rules.

(d) See observations, 1 Tyr. Rep. 21 a.

(e) See construction of these words in *R. v. Wright*, 1 Adol. & El. 442, and ante, 23.

(f) It will be observed that the terms of this enactment are only *permissive* not *imperative*, and although the Uniformity

of Process Act, 2 W. 4, c. 39, s. 14, is *peremptory* upon the judges, yet the precise rules are entirely in their discretion. The terms of 3 & 4 W. 4, c. 42, s. 1, ~~as~~ to *pleadings*, &c. are that the judges *shall and may*, &c.

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By RECENT
ACTS AND
RULES.

all the said Courts; which said rules and orders so made *shall be observed* in all the said Courts, and no *general* rule or order regarding such matters shall be made in any manner except as aforesaid." This enactment, it will be observed, *authorized* and *impliedly* required, but without *enjoining* the judges of the three Courts to meet, and a majority, including the three chiefs, to concur in making *general rules of practice* to bind all the Courts. But as it contains no *prohibition* against each Court making distinct rules for itself, it is clear that the jurisdiction to make *particular rules* continues, provided they do not militate against a general rule made under the authority given by the act; and accordingly the Court of King's Bench^(f) and Court of Exchequer^(g) and the Court of Common Pleas^(h) have made particular rules relative to certain proceedings in each of those Courts.

3. *General rules*
thereon of Trin.
T. 1831.

3. The judges did not make any general rules in pursuance of this authority until Trinity term, 1831, when a few rules were promulgated, relating as well to the forms of Declarations and Particulars of Demand as to the Practice in all the Courts, and in these fourteen judges concurred. ⁽ⁱ⁾ Those rules, in order that practitioners might have ample notice, concluded with a declaration that they should not take effect until the first day of Michaelmas term, A.D. 1831, excepting one rule relating to the service of declarations in ejectment, which took effect from the 25th day of October in that year.

General rules
thereon of Hil.
Term, 1832.

All the judges of the three Courts again in Hilary term, 1832, under the authority of the same act, 11 G. 4 and 1 W. 4, c. 70, s. 11, concurred in promulgating one hundred and seventeen important other new rules, the *recited* object of which was to *assimilate* and render *uniform* the practice of all the Courts, and certainly have so operated to a great extent; and the last seven and some others contain *entirely new* and very important alterations, and very extensively affected and improved the practice of all the Courts, especially in expediting the proceedings in an action, and rendering them much less expensive; and those rules commenced in operation on the 1st day of the following Easter term, viz., on 15th April, A.D. 1832. ^(k)

^(f) Rule M. T. 3 W. 4, K. B., but annulled by 3 & 4 W. 4, c. 42, s. 1.

^(g) See Rules of Exchequer, A.D. 1830, M. T. 1 W. 4, 1 Cramp. & J. 276 to 285; 1 Tyr. R. 154 to 166. But note that section 10 of the act impliedly required the judges of the Court of Exchequer to make particular rules for that Court in consequence of the admission of

attornies to practise therein and the transfer of business from the Welsh Courts.

^(h) Rules C. P. M. T. 1833 and Hil. T. 1834 and Trin. T. 1834; see Bingham's New Cas. vol. i. 242.

⁽ⁱ⁾ See Rules, Trin. T. 1 W. 4, A.D. 1831, *post*, Appendix.

^(k) See the Rules at length, *post*, Appendix.

All the judges again concurred in promulgating another general rule, though of less general importance, in Easter term, 1832, founded on the same act, 1 W. 4, c. 70, s. 11, ordering that the days between Thursday next before, and the Wednesday next after Easter day, (*viz.*, from the day before Good Friday until the day after Easter Tuesday,) should not be reckoned or included in any rules or notices, or other proceedings, except notices of trial and notices of inquiry, in any Court of law at Westminster. And a similar regulation is to be found in the 11th section of 2 W. 4, c. 39. It is essential to observe, that these rules of Hilary term, 1832, and indeed many other rules promulgated before the Uniformity of Process Act, (2 W. 4, c. 39,) must be examined and acted upon *with great caution*, because it will be found that many of them have been by that act or by subsequent rules *expressly* or *virtually* annulled.

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By Recent
Acts and
Rules.

General rule
thereon of
Easter term,
2 W. 4, 1832.

4. Other extensive alterations in the *Practice* and *Pleadings* of the Courts, either general or particular, were introduced by *subsequent statutes*, *viz.* by 1 W. 4, c. 3, (passed 23d December, 1830,) for amending the administration of justice, and especially in altering the commencement and termination of the terms, and in fixing the before moveable terms of Easter and Trinity; and by 1 W. 4, c. 7, (passed 11th March, 1831,) relating principally to expediting executions in vacations immediately after a trial; and by 1 W. 4, c. 21, (passed 30th March, 1831,) improving the proceedings in prohibition and mandamus; and by 1 W. 4, c. 22, (passed on the same day,) authorizing the examination of witnesses upon commission or interrogatories; and by 1 & 2 W. 4, c. 58, affording relief upon motion in Courts of law, in case of adverse claims, and called the Interpleader Act. But as regards the general process and practice of the Courts, the principal enactments have been in 2 W. 4, c. 39, (passed 23d May, 1832,) called the *Uniformity of Process Act*, (1) and the rules promulgated under the 14th section thereof of 2d November, 1832; also by the 2 & 3 W. 4, c. 71, passed 1st August, 1832, for limiting prescriptions; and by 2 & 3 W. 4, c. 100, limiting moduses and claims for tithes; and by 3 & 4, W. 4, c. 27, passed 24th July, 1833, relating to real property, and limiting claims and abolishing real actions and all mixed actions, excepting ejectment, dower and quare impedit. The

4. Enumeration
of the subse-
quent statutes
for improving
the practice,
pleadings and
evidence in the
Courts.

(1) The act 4 & 5 W. 4, c. 62, for amending the Practice of the Court of Common Pleas at Lancaster, will be found a lucid and useful consolidation and im-

provement of this and some other of the recent acts for improving the administration of justice.

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3 & 4 W. 4, c. 74, abolishes fines and recoveries, and substitutes more simple modes of assurance, and introducing in that respect a new course of practice in the Court of Common Pleas. (m) The 3 & 4 W. 4, c. 42, passed 14th August, 1833, called the *Law Amendment Act*, contains the *most numerous* and *extensive improvements*. The 3 & 4 W. 4, c. 67, was passed on 28th August, 1833, for the *Amendment of the Uniformity of Process Act*. The 4 & 5 W. 4, c. 39, gives costs in actions of quare impedit; and the 4 & 5 W. 4, c. 82, for altering the 2 & 3 W. 4, c. 100, limits suits for tithes, and authorizes the Courts to stay proceedings therein upon payment of costs. All these enactments of a *practical* nature will be found arranged in their natural order in the following pages; but it is expedient here to notice those enactments as apply to the practice of the Courts *in general*, and particularly those upon which certain *general rules* have been and may continue to be promulgated, together with the most important of those rules.

The Uniformity of Process Act, 2 Will. 4, c. 39, in particular, and amended by 3 and 4 Will. 4, c. 67.

To put an end to the *perplexity* and frequent errors occasioned by the great *variety* of process antecedently in use, the 2 Will. 4, c. 39, s. 1, (passed 23d May, 1832,) after reciting that the process for the commencement of *personal actions* in his majesty's superior Courts of Law at Westminster, is by reason of its *great variety* and *multiplicity very inconvenient* in practice, then prescribes only *five new forms of writ* (set forth in the schedule) and in substance applicable to every case that in a *personal* action can arise, and one of which is to be imperatively adopted in all those Courts, and also regulates the course of proceeding thereon, and which will presently form the subject of a distinct chapter; and as if the general powers given by 1 Will. 4, c. 70. s. 11, were inadequate, the same act, section 14, repeats and enacts "that it shall and may be lawful to and for the judges of the said Courts, *and they are hereby required*, (n) from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the *costs* to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed

(m) See Rules of C. P. M. T. 1833; and Rules Hilary, 1834, *post*, Appendix, especially as to acknowledgment of deeds by married women.

(n) The statute 1 Will. 4, c. 78, s. 11, does not contain these enjoining terms; see *ante*, 57, note (f).

necessary and proper; and for that purpose to meet as soon as conveniently may be after the passing hereof." And section 15 enacts, "that it shall be lawful in term time for the Court out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* shall have issued, to make rules; and also for any judge of either of the said Courts in vacation to make orders for the return of any such writ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose: provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court." This latter enactment was to enforce the immediate return of what had been done by virtue of enumerated writs, so as to avoid unnecessary delay on the part of the officer whose duty it was promptly to execute it. (o) The 18th section of the same act also empowers the judges of each of the said Courts to make such rules and orders for the government and conduct of the ministers and officers of their respective Courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of that act, as such judges may think fit and reasonable; but it is provided that no additional charge shall be thereby imposed on the suitors.

It is necessary constantly to keep in view that the enactments in the Uniformity of Process Act and the subsequent acts, and the rules made in virtue thereof, merely relate to and affect the process and pleadings in *personal* actions, and do not in any respect affect *real* or *mixed* actions, such as *ejectment*, either as respects the process or pleadings, and which are therefore still governed by antecedent enactments and rules. (p)

5. In pursuance of the 2 W. 4, c. 39, s. 14, all the judges in Mich. T. following (viz. on 2d November, 1832,) promulgated several rules relating to the *new processes*, requiring each to contain all and no more than the *names* of the defendants to be afterwards declared against, prescribing the *fees* to be charged for signing and sealing such process, and for entering appearances and certain *indorsements* on writs of summons and *capias*, and the forms of alias writs of summons and *capias*, and provides that every writ of *distringas* may contain a *non omittas*

5. General Rules founded on Uniformity of Process Act, 2 Will. 4, c. 39, 2d Nov. 1832.

(o) And see the Rules of Court to enforce this enactment; Rule III. T. 2 W. 4, 11th and 12th rules. Rule Mich. T. 3 Will. 4; Rule Hil. T. 3 Will. 4, *post*, of mesne process in general.

(p) This was doubted; see *Doe dem.*

Harries v. Roe, 2 Moo. & S. 619; Tidd's Supp. 122, 196, but afterwards settled per Parke, B. *Doe dem. Gillett v. Roe*, *Crompt. M. & R.* 19; *Doe dem. Fry v. Roe*, 3 Moo. & Sc. 376.

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clause without the payment of any additional fee; and then contains the most important order, that any *omission* in a writ or copy, or any indorsement thereon, of matter prescribed by 2 W. 4, c. 39, shall not render the process void but merely *irregular*, to be set aside by the Court or judge on application for that purpose. The same rules then order when a plaintiff may declare, and the consequences of a sheriff not obeying a judge's order for the return of any writ in vacation, and requires the supposed plaintiff's attorney to declare whether the writ was issued with his authority; and then prescribes how declarations shall be entitled and how they shall commence and conclude, and then by distinct rules prescribes the requisites and forms of writs to be issued into the counties palatine, and indorsements thereon.

General Rules
thereon of Hil.
T. 1833,

In *Hilary* T. 3 Will. 4, 1833, another rule was pronounced, giving effect to the latter part of section 15 of 2 Will. 4, c. 39, where a rule or order has been made for returning process.

—and of Trin.
T. 1833.

In the following Trinity T. 3 Will. 4, 1833, another rule was promulgated under the same act, rendering it imperative to declare against a *prisoner* before the end of the term next after the arrest or detainer, or render and notice thereof, and that otherwise the defendant should be discharged upon entering an appearance in the form required by the act, *unless further time to declare has been given* by rule of Court or a judge's order; also that the time for a prisoner's pleading shall be the same as where a defendant is not in custody; also regulating the time for the bail to render after service of process against them, and as to the payment of the costs of proceedings against bail.

The general
rules of Hil. T.
1834, partly
under 1 Will. 4,
c. 70, s. 11,
2 Will. 4, c. 39,
s. 14, and
partly under
3 and 4 Will. 4,
c. 42, s. 1.

Again, all the judges under the powers to make rules given as well by the 11 Geo. 4 and 1 Will. 4, c. 70, s. 11, as the 2 Will. 4, c. 39, s. 14, by rules of Hil. T. 4 Will. 4, A. D. 1834, relating to *practice*, introduced numerous miscellaneous orders materially affecting various stages in a cause, and which will be found dispersed in proper order throughout the following work; and also prescribing certain rules and forms calculated to save much expense in *evidence*. (q)

The 3 and 4
Will. 4, c. 42,
s. 1, and rules
thereon relative
to pleading.

Although the rule of Trin. T. 1 Will. 4, A. D. 1831, and Hil. T. 2 Will. 4, Reg. IV. certainly supposed that the 1 Will. 4, c. 70, s. 11, had authorized the judges to make rules not

only respecting practice but also *pleading*; (r) yet, for greater caution, especially when introducing many extensive and important alterations, it was deemed expedient to enact the 3 & 4 Will. 4, c. 42, which not only in itself contains very important changes in the law, but also gives authority to the judges, in section 1, to make rules for *altering pleadings and forms of entry* and allowance of *costs*, but not so as to affect the right to plead the general issue, when authorized by any particular statute; and section 15 authorizes the judges to make regulations as to the admission of written documents; and section 23 to make amendments *during a trial* in the *pleadings* in cases of *variance*; and by section 24, power is given by consent to state a special case before trial. Thus the *first section* expressly authorizes the judges from time to time, within five years, to make rules for alterations in the *mode of pleading*, of *entering*, and *transcribing pleadings, judgments*, and other proceedings at law, and as to the payment of costs; such rules, orders and regulations nevertheless to be laid before parliament a specified time (*viz.*, six weeks,) before they are to begin to operate. The 18th and 23d sections extend the powers of the judge or sheriff in *amending* the record to all cases of *variance* appearing during a trial.

In virtue of this enactment authorizing rules to alter the *mode of pleading* and the forms of *entries*, &c., the judges unanimously, in Hil. T. 1834, promulgated numerous rules of very great importance in practical effect as regards *pleadings* in *personal* actions, 1st. Requiring declarations and all other pleadings to be entitled of the day, month and year when pleaded, and which is to be observed in all subsequent entries; 2dly. That no entry of continuances by way of imparlance, &c., shall be entered; subject, however, to certain exceptions; 3dly. That judgment shall be entered of the day when signed; 4thly. That there shall be no entry on record of warrants of attorney to sue, &c.; 5thly. That *several counts* upon the same cause of action, and *several pleas*, avowries, or cognizances, on the same ground of defence, *shall not be allowed*; and then gives *instances* when or not two or more counts or pleas, &c., shall be admissible, and declares that such examples shall only be received *as instances* of the application of the rules to which they relate, and that the *principles* contained in the rules are

General Rules
of Hil. T. 1834,
as to *pleadings*
and *entries* on
record, founded
on 3 and 4
Will. 4, c. 42,
s. 1.

(r) It may be important to keep this power in view, as the judges might make rules respecting *pleading* without the necessity for laying the same before parliament, under the 3 and 4 Will. 4, c. 42, s. 1. *See* *semble*.

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not to be considered as *restricted* by such examples. The 6th and 7th rules were intended *rigidly and without exception*, other than therein expressed, to *enforce the observance of the fifth rule*, it having been anticipated that if, even by leave of the Court or a judge, the introduction of *several varying counts* upon the same cause of action were in any case admissible, there would be no limit to incessant applications, and the principle of the rule would soon become obsolete in practice. (s) The 8th rule, keeping in view the same object of avoiding unnecessary statement and repetition, declares that the statement of venue in the *margin* shall suffice, and that *no venue* shall be stated in the *body* of the declaration, or any subsequent pleading, except where local description is requisite. There are then a great many rules as well respecting pleading in general as pleading in particular actions, and some forms are prescribed as well of pleadings as of issues, nisi prius records, judgments and issues to be tried before the sheriff, writs of trial and indorsements thereon of a verdict or a nonsuit. All these rules of constant importance in practice it will be essential in the following pages more fully to consider in proper order.

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TION OF
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6. Consequent improvement in practice, and powers to continue ameliorations.

6. These several recent express *enactments* have themselves in many respects materially improved the practice, and the *rules* already promulgated have most extensively so operated; and as the 1 W. 4, c. 70, s. 11, the 2 W. 4, c. 39, s. 14, and the 3 & 4 W. 4, c. 42, s. 11, enable, and as it would seem, *impliedly require* the judges from *time to time*, when they think it necessary, to make new rules as well respecting *practice* as *pleading*, until the expiration of five years, it may be anticipated, that before the expiration of that time whatever may still be found objectionable either in practice or pleading will be effectually altered.

In what respects the present practice is objectionable.

Although these exertions of the legislature and the judges have greatly improved the practice of the Courts, the machinery of that practice, and the proceedings in bringing an action to trial are still too much subject to technical objections, and there are suffered to continue some diversities in the practice of the three principal Courts, (t) and it might be desirable that *a new general and comprehensive code* should be rendered impera-

(s) I have the highest authority for stating that such was the object of the rules.

(t) See *post*, *Bourne v. Walker*, 2

Crompt. & Mee, 338, 339; *Stainland v. Ogle*, 3 Dowl. 99; *Mayfield v. Davison*, 10 B. & C. 223.

tive, and that all previous enactments and rules should be annulled; and as the *process* returnable in all the Courts has been now rendered uniform, it would be desirable that, instead of *separate offices* for each Court, from whence the proceedings issue and chamber business is transacted, there should be only one *general office*, from and out of which all writs and business of the same nature should be issued or transacted, without regard to the Court in which the writ (now to be the same in each Court) is to be returnable, by which means much expense in keeping up separate establishments for each Court would be saved, and there would be greater probability of an uniform practice prevailing. At the same time taking care not to subtract from the number of officers *usefully* attendant on each of the Courts, or essential even for supporting due decorum or proper dignity. (u)

6. Since these several enactments and rules the antecedent practice, especially all rules antecedent to 2 W. 4, c. 39, must be considered and applied with great caution, because, although there may not have been any *express* alteration of the antecedent practice, yet a change or modification may under circumstances be *implied*; thus, although the general rule of II. T. 2 W. 4, c. 24, expressly directed that no bail-bond should be put in suit until after the expiration of four days, exclusive from the appearance day of the process, viz. in effect in London or Middlesex twelve days after the return day, it was held, that as the Uniformity of Process Act, 2 W. 4, c. 39, schedule No. 4, requires the defendant to put in bail within eight days after arrest, the above rule was thereby virtually annulled. (x) So, on the other hand, unless it be manifest that a repeal of prior practice was intended, it may continue

6. The general consequences of the recent statutes and rules, and of the judges *confering*, and the implied alterations in practice in cases not expressed.

(u) It will be observed, that as respects *different officers and offices for taxing costs* in the 3 & 4 W. 4, c. 42, s. 36, the legislature have supposed that either of the three officers is as competent as the other. It will be observed that writs, whether issued in *King's Bench or Common Pleas*, are alike sealed at the same office, viz. the Seal Office in Inner Temple Lane; and why should not process out of the *Exchequer* be also sealed there? and why should not all process of the same nature in all cases be transacted at *one general office*? (see Price's Gen. Practice, Preface, vi.) which would not only avoid the expense of several establishments, but also the variation in practice, and even in fees, in which there

is some difference, (Price's Prac. 26, 27.) But the difficulty would be in annulling vested rights and interests in certain public offices without an adequate fund to purchase the value of the permanent interests in each office. Other objections have been made against the Uniformity of Process Act, 2 W. 4, c. 39, requiring so much particularity in process, and giving rise to so many trifling objections in respect of irregularities in process, and which will be considered in the fifth chapter.

(x) *Hillary v. Rowles and others*, 5 B. & Adol. 460; and *S. P. Alston v. Underhill*, 3 Tyr. 427; 1 Crompt. & Mee. 492, S. C.; *Woosnam v. Pryce*, 3 Tyr. 375.

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as an *appendage* to the new law, as in the instance of the right of a defendant under the 43 G. 3, c. 46, s. 2, to deposit with the sheriff the sum sworn to, and £10 to cover costs, instead of giving a bail-bond, such right and practice, though not noticed in the Uniformity of Process Act, 2 W. 4, c. 39, *still continues* as an implied appendage of that act. (y) Again, we have seen that irregularities and other matters, which formerly must have been decided upon in *banc*, may now either expressly or *impliedly* be decided upon by a *single judge*, in consequence of the recent acts, and of the rule M. T. 3 W. 4, having authorized so many proceedings in a cause to be taken *in vacation* or before a judge; and on that ground it has been considered by Tindal, C. J. and Bayley, B. that a single judge at chambers *impliedly* has power upon summons and order to award costs; (z) and for this reason the former rule, that if an act of parliament give to the Court only power over a matter, a judge at chambers has no jurisdiction over it, (a) will not always apply, especially when the matter has arisen in the vacation. (b) And, it should seem, that whenever an old rule of practice would be inconsistent, even in part, with a more recent rule, and *contrary* to the spirit of the new enactment or rule for assimilating or rendering uniform the practice of the Courts, then there may be strong ground for considering such ancient rule impliedly abrogated; thus in a recent case, even in ejectment, an ancient proceeding in the Court of Exchequer, termed a subpœna solvas, was decided by that Court to be no longer necessary, in consequence of the *implied* alteration in the practice of the Court. (c) But still, however desirable an assimilation of the practice of all the three superior Courts may be, it must not be supposed that there is any *virtual* change in the practice of a *particular* Court varying from the practice in the other Courts, unless actually *so expressed*, or some *virtual general abolition* of the prior practice, as in the instance just referred to. And, therefore, in a recent case the Court of Exchequer declared, that as there was not in that Court any rule as in King's Bench requiring an affidavit of merits, or stating on whose behalf the motion was made, in support of

(y) Per Littledale, J. in *Geach v. Coppin*, 3 Dowl. 79.

(z) *Ante*, 21; *Doe d. Prescott v. Roe*, 9 Bing. 104. N.B. The case in 2 Barn. & Adol. 415; 1 Dowl. P. C. 52, to the contrary, was decided before the Uniformity of Process Act; and Lord Tenterden even there intimated that it might be found that the judge had the power.

(a) *Jones v. Fitzaddams*, 2 Dowl. P. C. 111; *Shaw v. Roberts*, *id.* 25; *Ex parte Owen*, 1 Dowl. P. C. 511; Arch. Prac. K.B. by T. Chit. page 12, 4th ed. 1834; and Bagl. Prac. p. 14; *ante*, 29.

(b) *Ante*, 24, 29.

(c) *Doe d. Fry v. Fry*, 2 Crompt. & Mee. 284; *Doe d. Floyd v. Roe*, 4 Tyr. Rep. 85.

an application to stay proceedings on a bail-bond, the proceedings should be stayed without such affidavit, and this even prospectively, as soon as bail above should have been perfected, although in the King's Bench in general the bail must have been perfected before any such motion can be made. (d)

It is certainly to be regretted that there are still a few instances in which the practice of the three Courts materially differs, and this even in giving effect to a statute. Thus very recently, and still under the 12 Geo. 1, c. 29, a plaintiff in the King's Bench has only *two* terms and a vacation to enter an appearance for the defendant sec. stat. (e), whilst in the Exchequer the plaintiff is allowed *four* terms or a *year* for that purpose. (f) And we have seen, that in the Exchequer one motion only is required in making a judge's order a rule of Court, and for an attachment for its disobedience, whilst in King's Bench two motions are still required; (g) and in King's Bench an affidavit of merits is essential in support of a motion to stay proceedings on a bail-bond, but is not required in the Exchequer, (h) and many other instances of varying practice might be adduced. These contrary decisions are in a great measure attributable to the Courts having consulted their officers as to the practice *in fact*, instead of consulting the terms of the enactment or its principle. (i) It would be desirable if all the differences were noted from time to time, and there were an occasional meeting of all the judges, when new declaratory rules might be pronounced according to the opinion of the majority, including always the chiefs, and thereby for the future settling all differences.

A few instances in which the practice of the three Courts still differs, and some suggestions to rectify the dissimilarity.

Formerly, when there were distinct and frequently dissimilar rules for each Court, it was rarely the practice of the judges of one Court to confer with those of another; but since the Uniformity of Process Act, 2 W. 4, c. 39, it is an established general principle that it is of importance to observe a *similarity of practice* in all the three superior Courts; and it is hence the practice for the judges of one Court, before they decide upon a question of general practice, arising upon a recent *general*

Consequences of the judges of each Court conferring with those of another Court.

(d) *Bourne v. Walker*, 2 Crompt. & Mee. 338.

(e) *Bridges v. Burn*, 10 B. & C. 456.

(f) *Cook v. Allen*, 3 Tyr. Rep. 378. But see observations of Hullock, B. in Price's Gen. Prac. 84, 85, post, 82, n. (l).

(g) *Howell v. Bulteel*, 2 Crompt. &

Mee. 339; *Steinland v. Ogle*, 3 Dowl. 99.

(h) *Bourne v. Walker*, 2 Crompt. & Mee. 338; but see *Rea v. Middlesex*, 3 Dowl. 194.

(i) Per Hullock, B. in an anonymous case, Price's Gen. Prac. 84, 85; and ante, 28.

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act or a *general* rule, and when there is a supposed difficulty or contrary decision, "*to confer with the other judges*, in order to secure an uniformity of practice;"(k) and hence it will be found that the inconvenience of conflicting decisions will in future rarely exist, at least for any considerable time, and that due exertion in bringing to the knowledge of either Court such contrary decisions, will soon lead to the best general settlement of the point.

7. Why an exact observance of the fixed practice is or should be rigidly exacted.

7. Individuals, who are not aware of or have not sufficiently appreciated the advantages resulting from the exact and constant observance of prescribed rules and forms, naturally complain of and condemn all technicalities independent of the substantial merits to be tried, and unquestionably that course of practice and of forms would be the best that would be found less subject to error or irregularity, arising even from negligence, since it is always to be regretted that *suitors* should be delayed or put to expense by the default of their legal agent. In this view the *new system* of practice, with the numerous particulars either in the body of the writ or the indorsement, *peremptorily* to be observed at the peril either *expressly* (as by rule Michaelmas term, 1832,) or *impliedly*, of the proceeding being set aside for *irregularity*, thereby occasioning a great increase of trivial objections, has been objected to by some as injudicious; and certainly it would be desirable if practicable to prescribe a form of proceeding sufficiently intelligible to a defendant of what he is required to observe, but at the same time susceptible of the fewest (if any) formal objections, and moreover taking away the temptation to object, by depriving the party objecting of any costs, unless it appear that the defendant has *really* been misled by the defect complained of. But whilst the present system stands unrepealed, *the Courts in Banc* and the *judges* individually have only one straightforward course to pursue, viz., when a prescribed proceeding has not been observed, to treat the same, when called upon to do so, as a *fatal irregularity*. And it must be especially kept in view that the judges, so far from desiring to *punish* practitioners for deviations from practice they ought to pursue, have by their rule of Michaelmas term, 3 W. 4, r. 10, endeavoured to mitigate or lessen the ill consequences of deviations from the forms prescribed by the legislature, by declaring under the

(k) See instances *Macalpine v. Powles*, 212; *Pickup v. Wharton*, 2 Cr. & M. 3 Tyr. 872; *Rea v. Price*, 2 Crom. & M. 406.

authority of 2 W. 4, c. 39, s. 14, that such deviations shall only constitute *irregularities*, and not render the process *void*; so that if in truth the modern forms are more full of technicalities then is essential, the defect in the system is attributable to the *legislature* and not to the *judges*. In general it will be found that most judges, when they have a *discretionary power* to prevent the mistake of the practitioner becoming injurious to the suitor, will exercise that power liberally, by allowing an amendment on payment of costs, to be borne by the practitioner guilty of the blunder; but it must be admitted, that unfortunately no amendment of *mesne* process is now permitted, and that sometimes it has occurred that even the most eminent judges have, for the sake of rigidly enforcing a particular statute or practice, refused an amendment, which might and ought to have been admitted. (l)

With respect to the necessity of enforcing a strict observance of prescribed forms, the observations of Eyre, C. J., relative to *pleadings*, are in this respect forcible and apposite, viz., “*infinite mischief has been produced by the facility of the Courts, in overlooking errors in form, thereby encouraging carelessness and placing ignorance too much upon a footing with knowledge;*” (m) or as the expression has since been, the permitting deviation from prescribed rules, would be *a bounty on negligence*. (n) So as regards the deviations, however small, from the forms of *process* prescribed by the Uniformity of Process Act, 2 W. 4, c. 39, even in cases where it is impossible that the defendant can have been misled, they are now deemed and treated as fatal, if objected to in due time and manner, and neither the Court nor the judge can, consistently, refuse to give full effect to the objection. (o) Thus in a late case, where the copy of a bailable *capias* had been delivered to the defendant, as in pursuance of 2 W. 4, c. 39, s. 4, but which left a blank for the day of the month, when the writ was supposed to have been issued, and was dated in the ninth year of William the Fourth instead of the third year, the Court refused to make absolute a rule for amending such copy, and made absolute a cross rule for discharging the defendant out of custody; because, as observed by Tindal, C. J.,

(l) *Ante*, 43; *Jelf v. Oriel*, 4 Car. & P. 22; *Parker v. Ade*, 1 Dowl. 643.

(m) Per Eyre, Ch. J., in *Morgan v. Sargent*, 1 Bos. & Pul. 59.

(n) Per Ld. Lyndhurst, in *Rea v. Calvert*, 2 Crompt. & M. 190.

(o) See *post*, V., Chapter on Process.

The Rule Mich. T. 1832, r. 10, founded on Uniformity Act, 2 W. 4, c. 39, expressly provides that any omission in the body of process or in indorsements prescribed by that act, shall be an *irregularity* and ground of application to the Court or a judge to set the same aside.

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" the statutory regulation impliedly rendered an arrest incom-
 " plete, unless a *copy* of the writ were forthwith delivered to
 " the defendant, and here the paper delivered was not a *copy*;
 " and that if the judges were to relax in the construction of the
 " word *copy*, motions might be made to amend, when the in-
 " formation intended to be given to the defendant would come
 " too late."(*p*) So in another case, where the copy of a bail-
 able *capias* stated the writ to have been directed to the Sheriff
 of Middlessex, omitting the *l.*, the full Court of King's Bench
 discharged the defendant out of custody, (*q*) and Lord Den-
 man, C. J., said, if either the *sound* or the *sense* be varied by
 the deviation from the prescribed form, the *copy* is not to be
 considered a *true copy*, and though the Court do not like such
 minute objections, still if they were to say that the taking away
one letter was immaterial, then *two* would be omitted, and then
three, and then *four*, so that at last the rule would be entirely
 lost sight of; (*q*) and where the writ having been directed to
 the Sheriffs of London, the copy delivered to the defendant
 described the writ as directed to the sheriff, omitting the *s*,
 the Court discharged the defendant upon entering a common
 appearance, (*r*) saying, "it is better to adhere to general rules,
 capable of application *in all cases*, than to raise an argument
 on every imperfection in a copy; (*r*) we do not say that the
 omission of a single letter will in *every* case be a conclusive
 objection to the sufficiency of the copy; but here, according to
 the copy, the writ is directed to the Sheriff of London, and we
 know that there are *two* sheriffs."(*r*) So where in a writ of
 summons, after having once set forth the christian and surname
 of the plaintiff, it was stated that "*the plaintiff*" (instead of
 repeating the christian and surnames as required in the form
 prescribed by 2 W. 4, c. 39,) "would enter an appearance for
 the defendant," after cause had been shewn against a rule for
 setting aside the summons for irregularity, Parke, J., in the
 Practice Court, said, "the omission was an irregularity; the
 statute provides a form in which the summons is to be drawn;
 and if parties will not take the trouble of looking at the act be-
 fore they proceed, they must take the consequences; *if we*
once enter into the question as to what is *material* or what is
immaterial in the process, we shall have innumerable questions

(*p*) *Byfield v. Street*, 10 Bing. 27; 2 Dowl. Pr. C. 739; and see *Smith v. Pennell*, 2 Dowl. Pr. C. 654, where "London" was omitted in the copy of the writ; and see *Street v. Carter*, *id.* 671.

(*q*) *Hodgkinson v. Hodgkinson*, 3 Nev.

& Maan, 564; 2 Dowl. 535, S. C.; see *quare*, see *post*, Chap. V.; and *Colston v. Berens*, 3 Dowl. 253, *contra*.

(*r*) *Nicol v. Boyne*, 10 Bing. 339; 2 Dowl. 761, S. C.

of that sort coming before the Court; the best way is to make parties remember the course they ought to pursue, by setting aside their proceedings, for 'not doing what they ought.'^(s) And in another case the full Court of Common Pleas declared, "*It is much better for the public to adhere in all practical cases to the strict, close, literal compliance with the forms prescribed by the act, rather than yield to particular cases of supposed hardship on individuals, when those requisites have not been formally complied with;*"^(t) and in another case the same Court said, "where a form is given, there can be no difficulty in pursuing it, and it is best in such a case to enforce a *literal* compliance with the directions of the legislature."^(u) And where the writ of summons was "in an action of *trespass on the case* upon promises," instead of observing the exact form prescribed in 2 W. 4, c. 39, (viz., "*action on promises,*") the Court set aside the proceedings, saying, "it is better to 'adhere to the strict form prescribed, otherwise the Court 'would be always discussing what deviation was allowable.'^(x) So if there be a blank left in a writ of summons for the residence of the defendant, or if such residence be *indorsed*, and not set forth in the *body* of the writ, it may be set aside, although in the first instance the residence was unknown."^(y)

But still it has sometimes occurred, that in cases where the form adopted has deviated from that prescribed, but has in ordinary acceptation been synonymous, the Courts have departed somewhat from such strict decisions, and overruled the objection; and the consequence in practice is that constantly attempts have been and will continue to be made, at least under circumstances when there is no case *precisely* similar, or directly in point, to sustain the deviating proceeding. Thus in a recent case an application was made by the Court of Common Pleas^(z) to discharge a defendant from custody on filing common bail, on the ground of irregularity in the process served upon him; the Uniformity of Process Act required a copy of the process to be served upon the defendant, and set out a form in which such process

(s) *Smith v. Crump*, 1 Dowl. Pr. Cas. 519.

(t) *Roberts v. Wedderburne*, 1 Bing. N. C. 6.

(u) *Lindredge v. Roe*, 1 Bing. N. C. 7; *Pepper v. Whalley*, id. 71. It will be remembered also that in one case a judge declared that if a statute be, though unnecessarily, set out in pleading, and be misrecited, he would hold the party even to

half a letter, and treat the variance as fatal. *Boyce v. Whitaker*, Doug. 97; *King v. Marsack*, 6 T. R. 776.

(x) *King v. Skeffington*, 1 Crompt. & M. 563.

(y) *Roberts v. Wedderburne*, 1 Bing. New C. 4; *Lindredge v. Roe*, id. 6.

(z) *Pocock v. Mason*, C. P. 4 Nov. 1834, MS.; and see 1 Bing. N. C. 245, S. C.

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should be drawn up. In the present case, however, there had been two deviations from that form—viz., instead of the words “within four days from *the* execution hereof,” the copy served contained these words, “within four days from execution hereof,” omitting the word “*the*.” The other deviation consisted in this: instead of the words “in pursuance of any order pronounced by the Court, or by a judge thereof,” were inserted the words “in pursuance of any order pronounced by the Court or a judge thereof,” omitting the word “*by*.” The counsel contended that great strictness had been observed by the Courts in adhering to the exact forms given by the act, and that if a deviation were once allowed in a trifling respect, it would be difficult to draw the line in future; but Tindal, C. J., said, that if the omission in question could make any possible alteration in the meaning, there might be some ground for the application; but as such was not the case, the Court did not feel that they were opening the door to any looseness of practice by refusing the motion.

8. Inconveniences in consequence of the distinctions between what is to be deemed *imperative* and what to be deemed only *directory*.

8. Much confusion has also arisen in some departments of practice by the Courts having admitted a distinction between a statute or rule being deemed *imperative* or only *directory*, so that similar expressions in different statutes have been construed either way, according to the supposed object or importance of the regulation. (a) Thus the statute 5 & 6 W. & M. c. 21 and 9 & 10 W. 3, c. 25, (now virtually repealed,) requiring the officer who signs bailable process at the same time to *indorse* the day and year of so doing, was treated as only *directory*, and that therefore, although the officer was censurable, still the omission did not vitiate. (b) So the 12 G. 1, c. 29, relating to the *indorsement* of the sum sworn to on the process before it was issued, was also held only *directory*, and that consequently the neglect to make it was not fatal. (c) But on the other hand it was decided that the statute 2 G. 2, c. 23, s. 22, directing that the name of the attorney immediately retained by the plaintiff should be indorsed on the process, or a label annexed, ought to be considered *imperative* and the omis-

(a) See *Whiskard v. Wilder*, 1 Burr. Rep. 330; but that was a mere obiter opinion not necessary for the determination of the point before the Court, and Sir J. Mansfield, in *Hill v. Heale*, 2 New R. 196, expressed a different opinion.

(b) 1 Imp. C. P. 154; *Coleby v. Norris*, 1 Wils. 91; *Windle v. Ricardo*, 3 J. B. Moore, 249; *Millar v. Bowden*, 1 Crompt. & Serv. 563; *Perry v. Turner*, 2 Crompt.

& J. 93; Tidd's Supplement, 1832, p. 15, note (d).

(c) *Supra*, *Whiskard v. Wilder* 1 Burr. 330; *Evans v. Bidgood*, 4 Bing. 63; but see *Hill v. Heale*, 2 New Rep. 202; Tidd, 159; and yet probably the object of that rule was to apprise the defendant of the amount of the debt, so that he might prepare to pay.

sion fatal, because that regulation was intended to enable the defendant to know who to apply to, and by the omission he *might* be prevented or delayed in taking proceedings to prevent the incurring of further costs. (*d*) So a non-compliance with the rule H. 2 & 3 G. 4, in the King's Bench, requiring the place of abode and addition of the defendant, or some other best description, to be indorsed on a bailable writ, was only considered an irregularity, when by the omission or misdescription the sheriff might be subjected to an action. (*e*) In a recent case counsel having contended that the general rule of Hil. T. 2 W. 4, as to the indorsement on process of the amount of the *debt and costs was merely* directory, and not compulsory, Taunton, J. forcibly observed, "*To say that it is only directory is only in other words to say that it means nothing; this must be considered as an irregularity. We have determined to treat the dereliction of it as an irregularity.*" It is a very important rule, and the object of it, which is to enable the defendant to pay debt and costs before any unnecessary expense is incurred, would be disappointed if this were not considered as an irregularity; (*f*) and the same judge in a subsequent case (overruling a decision in the Exchequer to the contrary but on another similar rule) decided to the same effect even in an action against an attorney, and although the intimation to him, being a lawyer, might not be so essential. (*g*) Upon the whole it should seem that when a *rule* or a *statute* prescribes any form or course of proceeding without expressly declaring the consequences of non-observance or deviation, the only certain course is to decide that every deviation is at least an irregularity, rendering the proceeding abortive if objected to in due time and manner. However, in one of the latest cases, where no notice of taxing costs had been given, pursuant to *Reg. Gen. Trin.* 1831, requiring a day's notice of taxing costs, the Court of Exchequer considered it to be discretionary to treat such omission as an irregularity. (*h*)

(*d*) *Gine v. Allen*, Barnes, 415; *Williams v. Lewis*, 1 Chit. Rep. 611; *Sheppard v. Sham*, 2 Tyr. R. 742; Tidd, 160.

(*e*) *Clarke v. Palmer*, 4 Man. & Ry. 141; 5 B. & Ald. 560. See other conflicting decisions upon the question when an act or rule should be deemed merely *directory* or *peremptory*, Tidd, 9th ed. 159, 160; Tidd's Supplement, 1833, p. 92, 93, note (*k*); *Gine v. Allen*, Barnes, 414, 415; *Whiskard v. Wilder*, 1 Burr. 330; *Coleby v. Norris*, 1 Wils. 91; *Mitchell v. Gibbons*, 1 Hen. Bl. 76; *Evans v. Bidgood*, 4 Bing. 63; *Windle v. Ricardo*, 3 Moore, 249; *Williams v. Lewis*, 1 Chit.

Rep. 611; *Millar v. Bowden*, 1 Cromp. & J. 563; *Sheppard v. Shaw*, 2 Tyrw. R. 742. But see *Ryley v. Boissomas*, 1 Dowl. P. C. 383, and *Tomkins v. Chilcote*, 2 Dowl. 187.

(*f*) *Ryley v. Boissomas*, 1 Dowl. Pr. C. 383; *Tomkins v. Chilcote*, 2 Dowl. Pr. C. 187, overruling *Millar v. Bowden*, 1 Cromp. & J. 563; and see per Parke, J. in *Smith v. Cramp*, 1 Dowl. Pr. C. 519, ante, 71.

(*g*) *Tomkins v. Chilcote*, 2 Dowl. 187.

(*h*) *Perry v. Turner*, 2 Tyr. 128; 2 Cromp. & Jer. 89, 1 Dowl. 300.

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9. Express rule, Mich. T. 3 W. 4, declaring that omissions in a writ or indorsement thereon, contrary to 2 W. 4, c. 39, shall be deemed an irregularity, to be set aside on application to the Court or a judge, but not to render the writ void.

9. To prevent all discussion whether the direction of the Uniformity of Process Act, 2 W. 4, c. 39, s. 1, 3, 4, 8, 12, and 21, and the forms in the schedule to that act, as to the requisites of the *writ* itself, or the *copy* or the *indorsements*, should be construed peremptory or merely directory, or be construed to render the process *void* and subject the parties acting under it to an action of trespass; the rules thereon of Mich. T. 1832, expressly ordered "that if the plaintiff or his attorney shall *omit* to insert in or indorse on any *writ or copy thereof* any of the matters required by the Uniformity of Process Act, 2 W. 4, c. 39, to be inserted therein or indorsed thereon, such writ or copy shall not on that account be held void, but may be set aside *as irregular*, upon application to be made to the Court out of which the same shall issue or to any judge." So that in cases of *any deviation* from the form of process or *indorsement thereon*, at least when prescribed by the *statute*, the objection is fatal, without regard to the degree of importance, if made in due time. (*h*) And although it will be observed that such rule is confined to defects in the several *writs therein mentioned*, the judges have recently expressed a resolution to consider ~~the~~ non-observance even of *their own rule*, requiring the amount of the *debts and costs* to be indorsed, to constitute an irregularity, but amendable; (*i*) and it is probable that a similar construction would now be given to *all other rules* requiring something to be done. But still it is to be regretted that there is no *express general rule* extending to *all deviations* from the regular course of practice. The general principle and inclination of the Courts are against objections, unless the opponent *has been* or at least *might* have been *really* misled or prejudiced by the mistake; but they must, though reluctantly, enforce the express directions of a *statute*.

It has been known that some practitioners have even purposely by designed deviations from prescribed or approved forms tried experiments in proceedings which ought not to be

(*h*) In 1 Archbold's Pr. C. P. [25], it is merely supposed that if any *material* part of the writ or copy of the indorsement on them be omitted, the Court or a judge will set aside the writ or service for irregularity. But it should seem from the decisions that an omission even in some *immaterial* matters would be holden equally irregular and fatal. The case of *King v. Skeffington*, 1 Crompt. & M. 363, there referred to, was an *immaterial* deviation, viz. instead of "action on pro-

mises," "action of trespass on the case upon promises," and yet the defect was held fatal. And see *Smith v. Crump*, 1 Dowl. Pr. C. 519, where Parke, J. expressly objects to any attempted distinction between what is a material or immaterial deviation.

(*i*) *Ryley v. Boissomas*, 1 Dowl. Pr. C. 383; *Tomkins v. Chilcote*, 2 Dowl. Pr. C. 187; *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68.

tolerated, as wasting the valuable time of the judges in listening to subtle arguments in support of such speculative deviations; and such practitioner should be properly punished with the payment of costs.

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It may perhaps be here expedient to attempt to explain the practical difference between acts *void* or merely *irregular* as used in this rule and elsewhere, and also the difference between them and proceedings *against good faith*. When a writ or other proceeding is *void*, as was the case before the Uniformity of Process Act if it were returnable on a *dies non*, (k) or if a term intervened between the teste and return of mesne process, it being defective on the *face of it*, was so utterly *void* that an action of trespass might be sustained against the attorney, sheriff, and officer for making an arrest under it, and an omission to object in the first instance would not in all cases prevent the party from taking advantage of the mistake. (l) So if a writ be executed on a Sunday the proceeding is by statute declared *void* to all intents and purposes, and the objection cannot be waived. (m) But if the proceeding be merely *irregular*, as if a judgment ~~had~~ been signed without a previous demand of a plea when requisite, the judgment is not void but stands until the Court on motion has set it aside as *irregular*; and the sheriff and his officers being ignorant of the defect are free from liability; but if the Court, *without imposing* terms, make absolute a rule for setting the same aside, then the plaintiff and his attorney (though not the sheriff) are liable to an action of trespass for any act done under an execution enforcing such irregular judgment. (n) So most irregularities must be objected to in the *first instance* after knowledge thereof, in order that the plaintiff may not incur expense by further proceedings. (o) In setting aside proceedings for irregularity, it is so far *discretionary* in the Court to interfere as regards the latter, that although they could not legally refuse to interfere, yet they may *disallow costs*, unless the applicant will consent not to bring any action for what has been done. (p) Another distinction is, that on account of *all* irregularities the party complaining must, as well by the uniform practice and decisions

The distinction between acts void or merely irregular.

Proceeding when void, and consequence.

Proceeding when irregular, and consequence.

(k) *Kenworthy v. Peppiat*, 4 Bar. & Ald. 238. And the Courts would not permit an amendment of such void process; but see *Adams v. Luck*, 6 Moore, 113; 3 Brod. & B. 25, S. C.

(l) Price's Pr. 300; *Ballentine v. Wilson*, Forest's R. 31; *Weston v. Faulkener*, 2 Price, 2; *Osborne v. Taylor*, 1 Chit. R. 400; *Hodson v. Garrett*, id. 174; *Anon.* 2 Chit. R. 237; *R. v. Sheriff of Middle-*

sex, 5 Bar. & Cres. 38; Tidd, 515.

(m) *Taylor v. Phillip*, 13 East, 155; *Roberts v. Moulhouse*, 3 East, 547.

(n) *Phillips v. Biron*, 1 Stra. 388.

(o) Tidd, 515; Chitty's Summary of Practice, 96 to 99, and *post*, as to the time of objecting to irregularities.

(p) *Lorimer v. Lule*, 1 Chitty's Rep. 134, cited in *Cash v. Wells*, 1 B. & Adolp. 375, *ante*, 29 to 32.

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of the Courts as by an express rule, (q) apply to the Court or a judge within a *reasonable* time, or at least so soon after knowledge of the defect as to prevent the plaintiff from incurring expense by a further proceeding founded on the irregular step; (q) and also before the party applying has himself taken a fresh step after knowledge of the irregularity. (q)

10. Breach of good faith, and consequence.

10. But an application for setting aside a judgment signed against *good faith* is *debito justitiæ*, and the Court will therefore not impose on the defendant as a condition for setting it aside that he bring no action. (r) The Court however will, in case defendant should refuse to submit to those terms, sometimes refuse the costs of the application, though usually it is considered advisable for the plaintiff's counsel to consent to the rule being made absolute with costs, to prevent their being laid as special damage in any action which the defendant might bring for the trespass, and by which means probably, if the damages recovered should be under 40s., the judge may certify, so as to deprive the plaintiff in such action of more costs than damages. (r) It will be expedient hereafter to introduce a distinct action taking a consolidated and comparative view of irregularities in different stages of a cause, and how to be taken advantage of, and therefore this general allusion to such objectionable proceedings may here suffice.

11. Whether it is imperative or discretionary in the Court or judge to set aside proceedings.

11. It has been decided that an application for setting aside a judgment as signed against *good faith* is *debito justitiæ*, and that the Court cannot, without the concurrence of the party applying, impose the terms that he shall not bring any action for what has been done under such judgment, but that having a general discretion over the costs of the application they may refuse them, unless the party consent to those terms; (s) and it seems equally imperative on the Court to give effect to an application to set aside proceedings in respect of a clear irregularity, (t) although they may refuse the costs of the application; (t) and when they have actually decided to refuse such costs, they cannot be recovered as special damages in an action of trespass or otherwise. (u)

12. Still it is not advisable to take advantage of small immaterial mistakes.

12. But although the legislature and the judges, in order to enforce *uniformity* and regularity, have deemed it expedient to

(q) Rule Hil. T. 2 W. 4, 1832, s. 33.

(r) *Cash v. Wells*, 1 Bar. & Adolp.

375.

(s) *Ibid*.

(t) *Scoble, id.* and *Loton v. Devereux*, 3 Bar. & Adol. 343.

(u) *Loton v. Devereux*, 3 B. & Adolp. 343.

make and enforce the several enactments and regulations respecting process and practice, it is not thence to be supposed that the indiscriminately taking advantage of trifling deviations from the prescribed forms, not really misleading or occasioning prejudice to a defendant, is to be considered worthy of a liberal profession (x) or even judicious; on the contrary, the judges collectively and individually always condemn such objections; (y) and it is frequently most injudicious and *injurious* to the client's interest for a practitioner to take advantage of such defects; for when taken on the behalf of a *plaintiff*, they are generally "in his own delay," and without any real advantage to the client; (y) and when taken on behalf of a *defendant*, although they may succeed in occasioning trouble, annoyance, delay, or expense, it is not afterwards to be expected that either the plaintiff or his attorney will be disposed, pending the subsequent proceedings in the action, to permit any accidental irregularity on the part of the defendant to pass unnoticed, or by candid admission to save some difficult proof, or the stamping a deed or other instrument on payment of a penalty, but will watch every opportunity to snap a judgment or other advantage, and after judgment has been obtained, he will not give any quarter or accept any compromise, which probably might have been granted if the cause had been defended with liberality. The same reasons should induce the avoidance of a *special demurrer* on the ground of a defect in *form*, which naturally irritates the opponent and his pleader or counsel and attorney. One of our most talented lawyers, the amiable and excellent instructor of more than half the bar, at the same time that he invariably inculcated the necessity for acuteness, astuteness, and full knowledge as well of technical rules as of scientific principles, as essential for the protection of the client's interest, and as weapons of defence against the technical objections of an opponent, even more impressively advised *the waiving of all petty objections*, and when time was required by a defendant, then in the choice of two evils, he recommended the adoption of a tolerated dilatory plea, to a demurrer however well founded, because the latter would create an unconquerable hostility on the part of the opponent, inclining him in his turn to take a technical objection whereby the time of trial was delayed by petty contests upon collateral points wholly immaterial to the merits. He truly suggested that the client on each side suf-

(x) See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; and per Parke, B. in *Gurney v. Hopkinson*, 3 Dowl. 193.

(y) It very frequently occurs that judgments are signed for want of a plea in an action which may be disputable, and upon which the defendant frequently

succeeds in moving to set aside such judgment upon an affidavit of merits, and then it is too late for the plaintiff to try at the sittings in or after term, and a delay of several months may arise, and ultimately the loss of the debt.

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fers as much or more from the *sharpness* of his own attorney as from that of the opponent, in consequence of such petty exhibitions of *acuteness* in trifles rather than in extended or scientific knowledge, and thus parties, who might have been reconciled, become determined enemies. It frequently occurs that a practitioner, though sharp in his practice, is prone himself to blunder, and when he has obtained a rule for setting aside his opponent's proceeding for irregularity, his own rule is discharged with costs, on account of some defect in his own affidavit or in the terms of his own rule; (z) and when a *technical* objection has been taken before a jury, they have been known to find their verdict against the party principally on that account. This view of the consequences of taking advantage of technical objections renders it desirable that some forms should be prescribed more exempt from similar objections, and that if such objections be tolerated, it should be in the discretion of the judge even to make the party taking them pay the costs, unless it appear that the client has really been misled or prejudiced by the deviation. (a) If any exception be allowed, it is in actions where the plaintiff has unnecessarily and vexatiously proceeded by *arrest*, in which case it is natural for a defendant to endeavour to obtain release from imprisonment, or to relieve his bail from liability, by endeavouring to set aside the plaintiff's proceeding for irregularity, and he may sometimes be morally justified in availing himself of the plaintiff's blunder in cases where the arrest has been vexatious and unnecessary. But such a motion can rarely be excused when the action has been commenced by serviceable process. In a moral view that system of prac-

(z) See an instance *Smith v. Crump*, 1 Dowl. Pr. 519; and *Macher v. Billing*, 4 Tyr. 812. Lord Coke observes *qui hæret in litera hæret in cortice*; and the late Lord Chief Justice Ellenborough observed to a counsel, who appeared too much attached to small objections, "Sir, if you cannot elevate your mind above such trumpery objections, you will never rise in your profession." It will be found of the utmost importance to a young barrister, especially if he has previously practised as a *pleader*, to avoid in Court the least appearance of pleasure when moving to set aside proceedings for irregularities, or any exhibition on account of his success on such points, and as the Court very reluctantly give effect to such motions, it is particularly important, when compelled to move by professional duty, to be fortified by the strongest decisions exactly in point, and by affidavits themselves free from objections. The late Ch. J. Ellenborough, though himself eminently

qualified as a special pleader, thus expressed to a barrister on the home circuit his dislike to technical objections: "I confess I always entertain strong prejudice against a special pleader called to the bar after long practice under it, because their habits appear to attach them too much to technicalities. I am happy as regards yourself that you have so soon removed that prejudice."

(a) There are many instances in which the Courts have so decided as to costs, even when a rule has been made absolute on the terms prayed, and there is no reason why the jurisdiction should not extend to a single judge. It would repress such motions and summons if the objection were allowed to prevail, but without costs, or on the terms of the party objecting paying costs of the summons and order, so that his laudable anxiety to have the strict practice of the Courts observed, would be gratified, though at his own expense and trouble.

tice would unquestionably be preferable that best avoids technical objections and acrimony between the respective attorneys, usually also extending to the clients, but unfortunately when the innumerable technical objections that have of late been made, especially under the authority of the uniformity of process act, 2 W. 4, c. 39, in the Practice Courts, and still more before a single judge, are considered, the new statutes and rules seem to have increased rather than diminished the number of annoying motions and summonses in a vexatious degree. Unfortunately, with but a very few exceptions, when a complainant thinks he has received an injury, or when an alleged wrongdoer is called upon to pay or make compensation, a malignant feeling, if not a spirit of animosity or revenge, influences each, and *not all* practitioners sufficiently think it their duty to repress such unworthy and injurious spirit. The complainant even expresses his desire to *punish* his opponent by *arresting* him, though he be notoriously solvent, or at least very unlikely to run away; such arrest stimulates to revenge, and every petty irregularity is afterwards greedily taken advantage of; and whilst the plaintiff improperly meditates annoyance, the latter becomes fraudulent and wastes the ~~wreck~~ ^{time} of his property in expensive protraction of the suit, and then endeavours to avoid lengthened imprisonment by a concerted bankruptcy, or attempts to obtain his discharge under an insolvent act. It is the duty of the legislature, and it is the anxious desire of the judges, to repress these disgraceful proceedings; but the legislature have not adopted any adequate direct system for the purpose, nor even left power to the judges to modify the evil. It is true that the Insolvent Act, 7 G. 4, c. 57, s. 49, enacts, "That if it shall appear to the Court that a prisoner petitioning for his discharge, shall have put any one of his creditors to *any unnecessary expense, by any vexatious or frivolous defence or delay*, to any suit for recovering any debt or sum of money due from such prisoner," then the Court may adjudge that the prisoner shall, as to such debt, not be discharged until the expiration of a term not exceeding two years. But this, perhaps, only extends to *sham pleading*, or other pretences not founded *in fact*, and does not apply to the taking *trifling objections* well founded *in law*; and if it were otherwise the act can only extend to a very limited number of defendants. Some judges also discountenance such objections by sometimes refusing *at chambers* costs to the party taking them. (b) But there

(b) *Quare*, notwithstanding the decisions that a judge now has a general jurisdiction to give costs at chambers, *ante*, 29 to 32, and Lord Denman's observations in

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Suggested no-
tices of object-
ing to process,
&c. before sum-
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is no other restriction, and it might be wished that there were some regulations preventing all objections on account of mere form from delaying or interrupting the progress of the suit, unless it appear to the satisfaction of the Court or a judge that the opponent was *really misled and prejudiced* by the error, but at the same time sufficiently repressing deviation from prescribed forms or other negligence, by subjecting the party guilty of it to summary proceeding for a small penalty or temporary suspension from practice, but from which the captious opponent should derive no advantage either in time or costs. This would effectually relieve the administration of law from the aspersion, that it unnecessarily encourages the indulgence of unjust resentment and the spirit of litigation, and at the same time protect it from the confusion that would ensue from the indulgence of negligence. (c) Perhaps as motions and summonses for irregularity are generally made on behalf of a *defendant* for the *purposes of delay and for costs*, it might tend to lessen the number of trifling objections, and avoid delay and expense, if before a party were allowed to move the Court or obtain a summons, for any purpose excepting release from actual imprisonment, he were required to give *two days' notice* of motion or summons, specifying the objections, and be allowed a small sum for the costs of such notice, so as to afford an opportunity to the opponent to rectify the mistake; and unless such notice has been given, and the irregularity be persisted in, no costs should be allowed except in cases where it is established that *actual prejudice* has already arisen from the irregularity. (d)

13. Discretion
of Court and
judge over in-
terlocutory costs.

13. In general, by statutes either general, or limited to the particular proceeding, *costs* are recoverable by a successful plaintiff or defendant upon a *judgment*, or other termination of a suit in his favor; and in some cases, even upon *interlocutory* proceedings, costs either follow the result, or the Court has an express jurisdiction over them. But almost universally, the *costs of summons, motions, proceedings relative to irregularities*, and other interlocutory proceedings, are entirely in the *discretion* of the Court or judge, as an incident of his jurisdiction over the

Shirley v. Jacobs, 6 Law Journal, 487, that it is imperative on a judge at chambers to give costs in cases of irregularity; it is stated that another learned judge, on setting aside a *capias* for irregularity, refused costs, saying, "Had you applied to the Court, costs might have been ordered, but if you come to this cheap and summary tribunal you cannot have them." 9 Legal Observer, 9. *Sed quare, ante*,

31, 32.

(c) In support of the proceedings, even in inferior tribunals, there are in general enactments to prevent or limit technical objections, as in convictions of justices, by 3 G. 4, c. 23; and in orders and judgments of justices, by 5 G. 2, c. 19, s. 1.

(d) And see the principle in *Beeston v. Beckett*, 1 Man. & Ry. 100; *Stephens v. Pell*, 4 Tyr. 267, 269.

principal matter; (e) and where a party applied by *motion* instead of *summons* to inspect an agreement, the Court refused costs. (f) In these cases, when the Court or a judge has refused costs at the instance of a party applying to set aside a proceeding for irregularity, then he cannot afterwards, in an action of trespass or otherwise, recover the amount of such costs as special damage occasioned by the irregularity; (g) and therefore it has been held that a defendant, on whose application a judgment has been set aside for irregularity in practice, but expressly without costs, cannot recover such costs as damages in an action of trespass against the plaintiff's attorney, for taking his goods under colour of such judgment; (g) and Lord Tenterden observed, "The irregularity was only a violation of a rule of practice. In such a case the Court has jurisdiction to say definitively whether there should or should not be costs, and they ordered the judgment to be set aside without costs. If costs might be recovered in this case, actions would frequently be brought for costs after the Court had refused to allow them." (g) In cases of clear and undoubted *irregularity*, it should seem to be imperative on the Court or a judge to give effect to the *objection* if taken in time, but it is *entirely discretionary* to allow or refuse costs. (g) Frequently the Court or a judge, in order to prevent trifling litigation, will refuse costs unless the defendant will undertake not to bring an action for the trespass or conversion committed under colour of the irregular proceedings; (h) and yet although the legislature have not allowed a defendant in error the costs of that vexatious proceeding, and the Court therefore have no direct jurisdiction to award them to the original plaintiff, yet where in an action of ejectment, the plaintiff succeeded in reversing a judgment in favor of the defendant, he was allowed afterwards to recover his costs in error in an action of trespass for mesne profits, alleging as special damage the costs and expenses he had been put to in endeavouring to recover possession. (i)

Sometimes the Court or a judge make a rule or order for setting aside the proceedings without saying anything about costs, or imposing any terms on the party applying not to bring an action; and in that case, if a trespass has been com-

(e) *Loton v. Devereux*, 3 Bar. & Adol. 343, 345; and see *Cash v. Wells*, 1 Bar. & Adol. 375, as to discretionary power of awarding costs, *id. ibid.*

(f) *Reid v. Coleman*, 4 Tyr. 274.

(g) *Supra*, note (e).

(h) *Ante*, 28; *Lorimer v. Lule*, 1 Chit. Rep. 131, and *Cash v. Wells*, 1 Bar. & Adol. 375.

(i) *Norrall v. Roak and others*, K. B. 10 Nov. 1827, Chitty's Col. Stat. 274, note (g).

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mitted under the irregular proceeding, the party thereby injured may bring an action of trespass, and lay as special damage that he thereby incurred and became liable to pay, and did pay to his own attorney, the costs of summons or motion for setting aside the proceeding, and on proof of his having paid such costs, may recover the same. (*h*) In other cases, sometimes the Court make such a rule absolute, but expressly declaring "without costs," in which case such costs could not afterwards be recovered by such action. (*h*) If a judge at chambers discharge a party from arrest on the ground of irregularity in the proceedings, and offer to give the defendant the costs if he will undertake not to bring an action, and the defendant refuse to give such undertaking, and therefore does not obtain an order for costs, he may in that case, in an action for the imprisonment, recover the costs of the summons, &c. as special damage. (*h*) Upon a new point, or where there have been contrary decisions, the Courts frequently discharge a rule without costs on either side. (*i*)

Practice of a
Court how to
be ascertained
and proved.

As connected with the subject of this chapter, "*Practice*," we may here properly consider how the *practice* of the principal Courts, or of an inferior or other Court, is to be ascertained or proved to the satisfaction of another Court, or before a jury. In general, when a question arises in either of the superior Courts of Law or Equity at Westminster relative to the practice of its *own Court*, in the absence of any statute or written rule or decision on the subject, the ordinary course of proceeding is ascertained *by inquiry of the officers* of the Court, to whom that branch of jurisdiction is most familiar, and who promptly in open Court state their knowledge of the practice; (*k*) and whilst the respective offices are filled by the present individuals, of great practical knowledge, experience, and integrity, no inconvenience can result from such inquiries; but, as a general principle, it is *better that the judges themselves should decide*, (*l*) especially in any case whether one or

(*h*) *Pritchett v. Boevey*, 1 Crompt. & Meeson, 777, per Bayley, B.; *Loton v. Devereux*, 3 Bar. & Adol. 343.

(*i*) *Nurse v. Grieling*, 3 Dowl. 158.

(*k*) *Re Perring*, 3 Dowl. 98; *Stainland v. Ogle*, *id.* 99; *Bugden v. Burr*, 10 Bar. & Cres. 457; *Cook v. Allen*, 3 Tyr. 378.

(*l*) See the statement of a case in Price's Gen. Prac. 84, note *, where the officers of the Court differed in their report of the practice, and Mr. Baron Hullock thereupon observed, "With deference to those judges who have been conversant with the practice of Courts of Equity, I must be allowed to say, that it is in my opi-

nion no part of the duty of a Court to take the practice from their officers in any case involving principle, however convenient it may be when the point made is mere matter of official course, depending on mere usage, of which it is not to be assumed that judges, unless of very long experience in the particular Court, are always cognizant.

"Since I have sat here I have found that there is anything but uniformity of practice or of opinion amongst the officers themselves. On a question of this sort, I will say further, that had the official report of the practice been made to us

two motions may be necessary, or large or small fees be paid. (m) In either of those Courts it is the practice for one or more of the judges of the Court, desirous of ascertaining the affirmative or negative, privately to confer with the judges or judge of such other Court, and thus establish the result. But it is obvious that where Courts are at a distance from each other, or inferior, so as to render it inconvenient for them to communicate so directly, then the proper course is to issue a *certiorari* to the inferior Court, directing the judge thereof to *return* the established practice of his Court. (n) We have seen that in one case, where a Court has in return to a reference or *certiorari* certified its practice, the same cannot be disputed unless a petition praying for a fresh reference or *certiorari* be presented, and supported by affidavit disputing the accuracy of the certificate. (o) The practice of the Ecclesiastical Court is matter of fact to be proved by evidence. (p)

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Where the parties to a common law action are disposed to try a question of fact or law fairly, it will be found that the proceedings under the improved system are free from difficulty; but by technical objections and oppositions, the collateral proceedings may become numerous, dilatory, and expensive.

Of the simplicity of the practice of the superior Courts when the parties are disposed to try a question fairly.

Thus, in actions liberally conducted, and opposed merely in order to bring a point fairly before a jury or Court, the plaintiff's attorney has merely to fill up one of the prescribed forms

Summary of the proceedings in a regular uninterrupted action.

without difference of opinion, I for one should not consider myself bound by it; and as in the case of the other day, where my brothers considered themselves fettered by what is termed the practice, I would have exerted myself in the endeavour to prevail on them to declare at once that such practice should no longer be observed.

"But what is this case? It is nothing like a mere practical question, such as whether a party has four or five days for taking a proceeding. It is a question of judicial construction of a modern act of parliament; and if the practice of any Court should be found to be inconsistent with what ought to be the course according to the true construction of any statute, it must be a practice which the Courts cannot uphold. A statute must be read with some regard to common sense, and this act of parliament was made to enable the plaintiff to act immediately on the defendant's default, and to advance his own proceedings.

"Then what reason is there why in this Court the plaintiff should be allowed to sleep over his rights, and keep dormant a process which he has called into action? Is it because in this Court the plaintiff sues not for himself, but for the king? and is it because this Court derives jurisdiction of pleas from the duty which belongs to it, of expediting the king's suits?

"I will only observe in conclusion, that if any such practice has prevailed in the office of the Court, it is not warranted by any, and is opposed to all principle; it cannot be considered by us as the practice of the Court in a matter in which there ought not to be any difference between the different Courts."

(m) *Staniland v. Ogle*, 3 Dowl. 99; *Howall v. Bulteel*, 2 Cr. & M. 339.

(n) *Williams v. Bagot*, 3 Bar. & Cres. 772; 5 Dowl. & Ryl. 719, S. C. where see the forms of *certiorari* and *return*.

(o) *Quesne v. Nicolle*, 1 Knapp's Rep. 257, ante, vol. ii. 4th part, 564.

(p) *Beaurain v. Scott*, 3 Campb. 368.

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of *writs*, usually either a writ of summons or a *capias*, the former serviceable, the latter to arrest the party; he must then carefully *indorse* certain intimations to the defendant on the writ, and should, for fear of loss, prepare a *precipe* or short memorandum of the substance of the process; and when he has had the writ signed by the proper officer, should leave such *precipe* with him to be there filed. Such process is then to be *served* in the proper county, or a written *undertaking* obtained from the defendant's attorney to *appear* for him, and in eight days afterwards the defendant must enter his *appearance*. The plaintiff is thereupon to deliver his *declaration*, accompanied in some cases with particulars of his demand; he is also to give a written *notice to plead* in a specified number of days, and rule the defendant to plead and demand a plea. The defendant is thereupon to deliver or file *his plea*, and the plaintiff is to deliver his *replication*, either joining issue, or if special, concluding with a verification, in which latter case the defendant is to deliver his rejoinder, whereupon, or even before, *issue* is said to be *joined*. The plaintiff is then to deliver the issue, being a copy of all the pleadings, and serve a *notice of trial*. The *nisi prius record* is then prepared and delivered to the proper officer, and the process to convene the jury is delivered to the sheriff, who summons the party to attend at the proper time and place, whilst in the interim the respective attorneys collect and adduce, or subpoena the *evidence* and *witnesses*, and prepare and deliver their *briefs* to the selected counsel; and on the appointed day and place, usually called at *nisi prius*, the judge with his officers attends, and the jury are sworn, the junior counsel for the plaintiff concisely opens or states the nature of the pleadings, and in particular the issues joined, and his leading counsel states fully to the judge and jury the nature of the plaintiff's case, and sometimes the anticipated defence, and argues upon the sustainability of the former, and the futility and injustice of the latter; the next counsel in seniority, or if there be only two, then the junior, who opened the pleadings, calls the first witness, who is then sworn by the proper officer, after which the last-mentioned counsel examines him, taking care to avoid all dangerous or leading questions, and the leading counsel takes notes of the evidence; the leading counsel for the defendant then usually cross-examines such witness, and the junior, or sometimes the leader for the plaintiff, when deemed advisable, *re-examines* such first witness. The next counsel for the plaintiff, or the leader, (if there be only two,) then calls and examines another

witness, whilst the other counsel takes notes of his evidence, and so on. When all the evidence for the plaintiff has been examined, the defendant's leading counsel observes upon the weakness of the plaintiff's case as proved, and states the strength of his own, in case he intends to give any evidence in support of the defence, and then the evidence for the defendant is given, and cross-examined in like manner. The plaintiff's leading counsel then *replies*; and in conclusion, the judge states to the jury a brief analysis of the pleadings and issue, and the facts as proved, and the law either for or against the claim or defence, and the questions of fact upon which the jury are to decide. The jury then find their *verdict*. If for the plaintiff, his counsel may then in certain cases pray an *immediate execution*, but otherwise no execution is issued until after the first four days of the ensuing term; within which the defendant must either move in arrest of judgment or for a new trial, or according to the terms of permission sometimes given by a judge, for leave to enter a nonsuit on the ground of the insufficiency of the case or evidence as given on the trial. If no such motion should succeed, then on the fifth day of the term or afterwards the *costs* are *taxed*, and a proportion allowed, and final judgment is *signed*; after which is issued a *writ of execution* either fieri facias against the plaintiff's goods, capias ad satisfaciendum against his person, or an *elegit* against a moiety of his lands and his goods, unless the same be delayed by a *writ of error*, which must now in general be returnable in the Court of Exchequer Chamber.

But although the proceedings in a suit may be thus seemingly simple and comparatively few, yet by very numerous irregularities and blunders and *occasional proceedings* they may be greatly interrupted. These irregularities and blunders may arise in almost every stage of the suit and on either side, as in the writ or indorsement, or in the served copy, or in the service or mode of executing the writ, or in the appearance or bail, or the declaration or notice thereof; in the notice to plead, and rule for or demand of plea, or in signing judgment for want of a plea, or in the inquiry or notice thereof, or in the notice of trial, &c. Irregularities *in practice* are usually taken advantage of in K. B. by affidavit, motion, rule nisi, and rule absolute, in the Practice Court during the terms, or by summons and order of a single judge in the vacation. But when the defect is in the form of *pleading*, either in a declaration, plea, replication, &c., the objection is usually to be taken

Irregularities and collateral or occasional proceedings in a suit.

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by *demurrer*, though sometimes it constitutes an irregularity that may be objected to by *motion*. If by *demurrer*, then the party whose pleading has been objected to either obtains leave to amend or he joins in *demurrer*, and paper books are delivered to four of the judges of each Court, and the party proceeds to argument and the Court gives judgment. But besides these irregularities there are many other *occasional proceedings* on either side, as motions and rules for security for costs, summons and orders for particulars or better particulars of the plaintiff's demand, or the defendant's set-off, demands of oyer, or summons for inspection of documents or to compel a party to produce an original instrument at the stamp office to be stamped and delivering a copy to the applicant; (q) motions for changing or bringing back the venue; special cases stated by consent after issue joined or after trial; demurrers to evidence and bills of exception pending a trial; and various other proceedings to be noticed in the following pages.

Proceedings of
less frequent
occurrence.

There are also other occasional descriptions of business, some of which occur in the course of an action, but which are less frequent than those just mentioned; such as proceedings by habeas corpus, on awards, annuities, mortgage-deeds, bail-bonds, replevin-bonds, warrants of attorney, respecting officers of the Courts and attorneys and their clerks; also proceedings under the Interpleader Act in relief of sheriffs or other third persons, the examination of witnesses under a commission or on interrogatories, and various other occasional proceedings.

Practical pro-
ceedings pecu-
liar to one of the
three Courts.

There are also in each of the three superior Courts occasionally certain proceedings *peculiar* to that particular Court, as in the King's Bench, incidents of its *criminal* and superintending jurisdiction over indictments, criminal informations, articles of the peace, quo warranto, mandamus, and prohibition; the removal by *certiorari* of indictments and presentments, convictions, or orders from inferior Courts and commissioners of sewers; and by writs of error; and of the hearing of special cases from the sessions relative to poor rates, settlements and orders of removal. In the Common Pleas, proceedings on writs of dower or in quare impedit, and relating to the forms of conveyances substituted for abolished fines and recoveries; and in the Exchequer, as incidents of its *revenue jurisdiction*, certain peculiar proceedings by extent in chief or in aid, the recovery of legacy duties, taxes, custom duties, and its exclu-

(q) *Ante*, 81, note (f).

sive jurisdiction over informations upon seizures made under the revenue laws.

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The practice, as respects these subjects, will be stated in this volume in the same order as, *first*, the ordinary proceedings in an action by *serviceable* process where there is no interruption; *secondly*, the proceedings in *bailable* actions, and of irregularities taken advantage of by summons or motion or demurrer, and also the occasional proceedings without irregularity; *thirdly*, the still less frequent proceedings, but which sometimes occur; and *fourthly*, the particular proceedings confined only to one Court.

The practice in the superior Courts of *Law* at Westminster differs from that in the Courts of *Equity* principally in two particulars, viz. that at law (with the exception of the now abolished commencement of an action by *special original* in *assumpsit* and *trespass*, when the whole causes of action were set forth,) the defendant had no information, until after he had appeared, of the particulars of the plaintiff's complaint, but was brought into Court to answer a very concise process even in *bailable* actions, merely stating the form of action, (except in an action on a recognizance, and then merely referring to "a recognizance of bail,") and in *serviceable* process the defendant had not, before the declaration, the least intimation of the form still less of the subject-matter of the dispute; and although the Uniformity of Process Act, 2 W. 4, c. 39, requires *serviceable* process to state in the body of the writ the *form* of action, and the rule Hil. T. 2 W. 4, 1832, s. 2, requires that on all process or copy of process for a *debt* the amount of the debt and costs claimed shall be indorsed, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings shall be stayed, and the same rule prescribes the form of such indorsement; (r) yet the information thus afforded is very limited, and in all other cases the proceedings do not before the declaration inform the defendant of the exact nature of the plaintiff's claim, though in *some* cases, even before appearance, the defendant may on summons compel the plaintiff to state the *particulars* of his claim, so as to enable him to offer compensation before he has incurred the expense of declaration. But in *equity* the statute for the amendment of the law, 4 Ann. c. 16, s. 122, expressly enacts

Of the differences between the practice at law and in Courts of Equity.

(r) *Post*, Appendix.

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that no *subpœna* or other process for *appearance* shall issue out of any Court of Equity till *after the bill has* been filed with the proper officer, excepting however cases of bills for injunction to stay waste or stay suits at law already commenced. (s) So that in general a *bill in equity*, fully stating the complaint and all its circumstances, must be filed in the first instance, and the subpœna is merely issued to inform the defendant thereof and require him to appear in Court and answer the same; and he may obtain a copy of such bill and thereby know the full subject of complaint.

Another difference is, that in equity *no arrest* of the defendant is permitted, except in the instance of *ne exeat regno*, when it is sworn that there is a mere equitable cause of action and that the defendant is about to abscond and leave the kingdom. (t)

Another most important distinction in practice between the two descriptions of Courts is, that *at law* disputed facts, which constitute the *point in issue* in a cause formally and compactly joined upon distinct *pleadings*, are in general *tried by a jury* convened before a judge, (or a sheriff when the claim is under 20*l.*,) though there are certainly innumerable disputes upon irregularities and practice, and some collateral summonses, motions, and rules that are disposed of by affidavit, upon the weight of which the Court or the master thereof decides; whilst *in equity* the judge always decides upon long and intricate statements in the bill, answer, or affidavits, or interrogatories, unless he think that the truth as disclosed by those documents, sometimes very contradictory, is so uncertain that it is more fit that it should be investigated and decided upon by a jury, in which case he directs an issue to be tried in a Court of law and the result to be communicated to him, and upon which he decides.

(s) See Chitty's Col. Stat. tit. Court of Equity, p. 233, and *id.* note (a); 1 Newl. Pr. 62; 2 Mad. Ch. Pr. 197.

(t) *Ante*, vol. i. 731, 733.

CHAPTER III.

OF THE TERMS AND VACATIONS, SITTINGS AT NISI PRIUS, IMPARLANCES, DIES NON, HOLIDAYS, YEAR, HALF YEAR, MONTH, AND WEEK, AND TIME IN GENERAL AS IT AFFECTS PROCEEDINGS IN ACTIONS AT LAW. (a)

1. Of the Terms and Vacation, Essoin and Return Days, and how altered and consequences	89	5. Months, how calculated	108
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THE first consideration in a chapter respecting *Time* would be whether any *statute of limitations* has already barred all remedy, a subject already fully examined. (b) If the limited time for suing is only *nearly expired*, then it is essential *immediately* to commence a proper *personal action* by appropriate process, stating the intended form of action to be afterwards adhered to, and to cause the same to be *continued* in the manner shewn in a subsequent chapter. The next and very important subject is the distinction between the *Terms* and the *Vacations*, being the times between each term, and which we will now examine.

CHAP. III.

Limitations of actions referred to.

Before the recent enactments the four divisions of the year called the *Terms* were more important than at present, because many proceedings in a cause that may now be transacted in the *Vacation* or between the terms could before only take place *during* one of the terms. All process, whether mesne or final, and whether in personal, real, or mixed actions, must formerly have been *tested* and *returnable in term time*, and when the pleadings were *ore tenus* they were actually stated to the Courts whilst sitting in one of the terms; and although at a very early period the practice of pleading *ore tenus* was abandoned, and the *pleadings* were reduced into writing, still it was considered that unless a declaration were delivered *during a term*, no plea on the part

Terms and vacations, essoin, general return-days, and how altered and affected by modern statutes and rules.

Formerly few proceedings in vacation.

(a) And see further as to time, Chitty's Col. Stat. tit. Time.

(b) *Ante*, vol. i. 736 to 786.

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&c.

of a defendant could be required before the *next term*, but he was entitled to an *imparlance*. As the terms, with reference to the entire year, constituted a very small portion of it, viz. only ninety-one days, and Easter (the longest term,) contained only twenty-four days, it followed that no great progress could be made in an action in the terms, and the same was for *many* purposes suspended during the vacations, although on principle there could be no objection to all proceedings, not actually requiring the interposition of the *four judges in banc*, taking place as well during the vacation as pending the terms.

The following acts it will be found have most materially altered the ancient law in this respect, and authorized most practical proceedings in an action during *the vacations* as well as in the terms. The 1 W. 4, c. 7, s. 1, as to writs of inquiry, and 2 W. 4, c. 39, as to writs of *summons* and *capias* in *personal* actions, enacts that they are to be *dated* or *tested* on the day when *issued*, and to be in force for four calendar months, and not to have any *return day*, though as to proceedings by *distringas* or to *outlawry* they must still be returnable on a day certain in term. The terms also were holden at different times of the year to those *now fixed*, viz. Hilary term was *FIXED* to commence on the 23d January and ended on 12th February; Michaelmas term commenced on the 6th November and ended on the 28th November. Easter and Trinity terms were termed *moveable* because they then depended in their commencement on the *moveable* feasts of Easter-Day and Trinity-Sunday, which in successive years fall at different periods.

Alterations by
11 G. 4 and 1
W. 4, c. 70, (c)
and 1 W. 4,
c. 3.

But great alterations in these respects, as well respecting the *commencement* as the *duration* of the *terms*, and *essoins* *days* and *general return days*, and the *teste*, *duration*, and *return* of certain writs, and in other respects, were effected by an act passed in the sessions of 11 G. 4 and 1 W. 4, c. 70, (c) s. 6 & 7, (passed 23d July, 1830,) and by the 1 W. 4, c. 11, s. 1, 2, and 3, (passed 23d December, 1830,) and certain rules thereon. (d)

(c) In order to prevent any confusion that might arise by calling the first act, 1 W. 4, c. 70, when there are *subsequent* acts of 1 W. 4, c. 5 and ch. 7, I have here described it as of the *sessions* when it was enacted; but in *pleading* and in all other technical proceedings it is to be termed 1 W. 4, c. 70; and in *pleading* it would be fatal to describe that or any act as made in 11 G. 4 and 1 W. 4, for a *statute* cannot be enacted in two different

reigns, though it may have been enacted in a *sessions* extending into two king's reigns; *R. v. Biers*, 1 Adol. & Ellis, 327.

(d) With respect to the terms and vacations, *essoins* and *return-days*, as formerly regulating all actions, and which still prevail in *mixed* actions and *scire facias* and *replevin*, not repealed by 3 & 4 W. 4, c. 47, as *quare impedit*, see 3 Bla. Com. 275, 276, 278; Sellon's *Prac.* vol. i.

Thus, as respects the terms, the 11 G. 4 and 1 W. 4, c. 70, s. 6, without any recital, enacts that in A. D. 1831, *and afterwards*, the terms shall begin and end as follows, viz.—

Hilary Term shall *begin* on the 11th and *end* on 31st January.

Easter Term shall *begin* on 15th April and *end* on 8th May.

Trinity Term shall *begin* on 22d May and *end* on 12th June.

Michaelmas Term shall *begin* on 2d November and *end* on 25th November.

And that the *essoins* and general return days of each term shall, until further provision be made by parliament, be as follows, that is to say, *the first essoin or general return day* for every term shall be *the fourth day before the day of the commencement of the term*, both days being included in the computation; the *second* *essoins* day shall be the fifth day of the term; the *third* *essoins* day shall be the fifteenth day of the term; and the *fourth* and last shall be the nineteenth day of each term; the first day of the term being already included in the computation with the same relation to the commencement of each term as they now bear, and shall be distinguished by the day of the term on which they respectively fall, the Monday being in all cases substituted for the Sunday when it shall happen that the day would fall on Sunday, except always that in *Easter* term there shall be but *four* returns instead of five as heretofore, the last being omitted; provided that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after *Easter-day* shall fall within *Easter* term there shall be no sittings in banc on any of such intervening days, but the term shall in such case be prolonged and continue for such number of days of business as shall be equal to the number of the intervening days before-mentioned, exclusive of *Easter-day*, and the commencement of the ensuing Trinity term shall in such case be postponed and its continuance prolonged for an equal number of days of business.

Section 7 enacts that when the alteration of the terms therein-before mentioned should take effect, not more than *twenty-four days*, exclusive of Sundays, after any Hilary, Trinity and Michaelmas Term; nor more than *six days*, exclusive of Sundays, after any Easter Term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in London and Middlesex for the trial of issues of fact arising in any of the said Courts; *provided* that if any *trial at bar* shall be directed by any of the said Courts it shall be competent to the judges of such Court to appoint such day or days for the

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OF TERMS AND
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Prescribed
commencement
of each term,
and the four
essoins or general
return-days
in each.

Prescribed
number of the
days of sittings
at Nisi Prius in
Middlesex and
London, be-
tween the
terms.

Proviso for
trials at bar.

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&c.

And for trials
at Nisi Prius on
any day with
consent of par-
ties.

Immediate
judgments on
indictments in
vacations.

Justifying
bail in vaca-
tion.

Expediting
proceedings in
actions of eject-
ment, and im-
mediate execu-
tion therein.

Enactments in
1 W. 4, c. 3,
again altering
return-days and
duration of
terms.

trial thereof as they shall think fit, and the time so appointed, if in vacation, shall for the purpose of such trial be deemed and taken to be a part of the preceding term; provided also that a day or days may be specially appointed, at any time not being within such twenty-four days, for the trial of any cause at Nisi Prius with the consent of the parties thereto, their counsel, or attorneys.

The 9th section authorizes judgments on *indictments* for felonies tried upon a record out of the King's Bench, to be given by the single judge *immediately after the trial* at the *sittings* or at the *assizes* in *vacation*, instead of waiting as heretofore, and giving judgment in term time by and before the full Court.(d) And the 12th section enacts, that *bail* may be *justified* before a judge at chambers or elsewhere, in *vacation* as well as term, and whether the defendant be actually in custody or not; whereas before that act, bail could not justify at chambers or in vacation, unless the defendant was in actual custody, or by consent.

The 36th section as to actions of *ejectment*, where the right of entry has accrued to a landlord *in or after Hilary or Trinity Term*, enables him to proceed to trial in the vacation after those terms in the manner therein prescribed, the declaration to be entitled specially; and moreover enables the judge, immediately after the trial, to certify his opinion on the back of the record, that a writ of possession should issue immediately, and the same shall issue accordingly.

The 1 W. 4, c. 3, (passed the 23d December, 1830,) "for the better administration of justice so far as relates to the essoin and general return days of each term, and to substitute other provisions in lieu thereof, and to declare the law with regard to the duration of the terms in certain cases," by section 1st repeals so much of 11 G. 4 and 1 W. 4, c. 70, s. 6, as relates to the appointment of essoin or general return days; and section 2 enacts, "that all writs now usually returnable before any of his Majesty's Courts of King's Bench, Common Pleas or Exchequer respectively, on general return days, that shall be made returnable after Jan. 1, A. D. 1831, may be made returnable on the third day exclusive before the commencement of each term, or on any day, not being Sunday, between that day and the third day exclusive before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return, or in

(d) See the enactment, decisions, and observations, *ante*, vol. ii. 366.

case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return.

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Section 3rd, after reciting that it is expedient to remove all doubts that may exist as to the duration of the terms in any case that may occur, enacts, "that in case the day of the month on which any term, according to the act aforesaid, is to end, shall fall to be on a Sunday, then the Monday next after such day shall be deemed and taken to be the last day of the term; and that in case any of the days between the Thursday before and the Wednesday next after Easter shall fall within Easter term, then such days shall be deemed and taken to be a part of such term, although there be no sittings in banc on any of such intervening days."

But it will be presently seen, that the Uniformity of Process Act, 2 W. 4, c. 39, prescribing writs of summons and *capias* in *personal* actions, without any return day, and providing that act shall continue in force for four calendar months from the date, has in practice almost extinguished, as regards such *personal* actions, the distinction between the different return days in a term. They however still apply to those actions, the proceedings in which are not affected by 2 W. 4, c. 39, as *dower*, *quare impedit*, *ejectment*, *replevin*, *scire facias*, &c.

The 1 W. 4, c. 7, (passed 11th March, 1831,) for more speedy judgment and execution in actions in the Courts of Law at Westminster, in section 1 enacts, "that all *writs of inquiry* may be made returnable and be returned on a day certain in term or *vacation*, to be named in such writ; and that thereupon in such *vacation*, after a rule for judgment, costs taxed, and final judgment signed, execution may be forthwith issued, unless the *sheriff* or other officer should certify that judgment ought not to be signed until the ensuing term, or unless one of the judges should think fit to order the judgment to be stayed until a day to be named in his order." And sect. 2 authorizes a judge at *Nisi Prius* to direct *immediate execution after a verdict*; and sect. 3 directs that the writ of execution *may* (e) be tested on the day it issues, although in the *vacation*; and section 3 enacts, that every judgment to be signed by virtue of that act, *may* be entered and recorded as the judgment of the

Alterations by
1 W. 4, c. 7.
Writs of in-
quiry return-
able in *vacation*,
and *immediate*
execution there-
on, and also
after verdict in
vacation.

(e) As the act thus merely authorizes the writ to be tested on the day it is issued, it *may* also, as before, be tested of the preceding term; and should be so if the defendant died before the day of issuing the execution, and after the first day of the preceding term. *Brocher v.*

Pond, 2 Dowl. Pr. C. 472; *sed quare* see *Peacock v. Day*, 3 Dowl. 291; 9 Legal Observer, 251, 252. Littleale, J. held irregular a *scire facias* against bail, tested of the preceding term, and before the day of judgment against principal. And see suggestion, 3 Dowl. 294, note (a).

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Court, although the Court may not be sitting on the day of signing thereof, and every execution issued by virtue of that act shall and *may* (f) bear *teste* on the day of issuing thereof, and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law. Before this act, when a cause stood for trial at a sittings in term, and the cause was made a remanet to the sittings after it, on the terms expressed in a rule of Court drawn up for the particular purpose, that the plaintiff should be entitled to a judgment of the preceding term in case he obtained a verdict, the course was to state on the record of the judgment such rule by consent, whereby the inconsistency in the judgment appearing antecedent to the trial was cured; and since this act a *fieri facias* on a judgment, signed after the defendant's death in vacation, may be tested on the last day of the preceding term, as the act only enacts that it *may* be tested on the day it issued, and not that it *must* or shall be so. (g) But section 4 provides, that in the next term the Court may set aside the judgment and execution, and grant a new trial or inquiry. That act was an extension of 11 G. 4 and 1 W. 4, c. 70, s. 36, which we have seen (h) previously allowed in vacation an execution by *haberi facias*, immediately after the trial of an action of ejectment. But sect. 6 enacts, that no officer shall be *compelled* (i) to attend to *tax costs* on any judgment signed by virtue of that act, at any time between the 30th August and 21st October in any year. Upon this section it has been suggested, that probably during that time a plaintiff might issue execution for the sum recovered by the verdict, (j) and on or after such 31st October tax his costs, and issue a fresh execution for them. (j) The 8th and 9th sections relate to the returns of *writs of inquiry* in the counties palatine and the return of writs removing actions in inferior courts into the Common Pleas at Westminster, and in order to expedite the proceedings, requires them to be returnable on the first Wednesday in every month.

But the principal act tending to destroy the distinction

(f) *Supra* last note.

(g) *Bracher v. Pond*, 2 Dowl. Pr. C. 472; but see qualification, *Pracock v. Day*, *ante*, 93, note (c).

(h) *Ante*, 92.

(i) From this expression it should seem that if the proper officer can be prevailed upon to attend, he might legally tax costs during or between these days,

and that the enactment is merely to afford him a reasonable holiday if he think fit.

(j) Dowl. Statute, 1 W. 4, c. 7, p. 17, in note. Certainly if the plaintiff be content to give up his costs, this may be done, 5 East, 146; 4 Taunt. 280; Tidd, 994; Chitty's Summary Prac. 195; but *quare* as to any subsequent proceedings to obtain costs.

between term time and vacation, and particular return days, as respects most *personal* actions, is the Uniformity of Process Act, 2 W. 4, c. 39, (passed 23d May, 1832,) which, as regards all mesne process in *personal* actions, wholly puts an end to the previous necessity for *certain* mesne process (i. e. writs of *summons* and *capias*, and *detainer*, (*k*) constituting by far the most usual proceedings in an action at law,) being *tested*, or *returnable in term time*, by requiring, in section 12, that all such writs of summons and *capias* shall be *dated on the day when issued*, whether in term or vacation, and shall not be made returnable on a particular day, but shall be *in force for four calendar months* from the day of the date inclusive thereof. (*l*) And sect. 15, and the rule of Mich. T. 3 W. 4, 1832, and Hilary Term, 1833, order that a judge may make an order on the sheriff or other officer to return the writ and what has been done thereon, so as to prevent delay in the action after the process has been so executed, before the expiration of the four months. But section 3d requires that writs of *distringas* shall be tested on the day of the issuing thereof, whether in term or vacation, though to be *returnable in term time*, on some day certain, not being less than *fifteen days* after the teste thereof; and by section 5, in proceedings to *outlawry*, every writ subsequent to the writ of *capias* or *distringas* shall be *tested* on the day of the return of the next preceding writ, and be made returnable on a day certain in term.

Since this act, although the writ of summons or *capias* *must* be correctly dated of the day when actually issued, or it may be set aside, (*m*) yet all the other innumerable motions for irregularity in respect of mistakes in the date or return day, or on account of a term intervening between such date and return, or the return day being a dies non, have necessarily ceased, so far at least as regards most *personal actions*.

But the even still more important enactment tending to diminish the distinctions between terms and vacations, is contained in the 11th section of 2 W. 4, c. 39, which, after reciting that, according to the then existing practice in certain cases, no proceedings could be effectually had on any writ returnable *within four days* of the end of the term until the beginning of the ensuing term, *whereby an unnecessary delay has been sometimes created*, for remedy thereof enacted, that if any writ

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the Uniformity
of Process Act,
2 W. 4, c. 39.

2 W. 4, c. 39, s. 11, as to vacations and certain excepted days, enabling a plaintiff to issue his writ and proceed to judgment and execution, even in the same vacation.

(*k*) But writs of *Distringas*, *Exigent*, and *Proclamation*, must still be returnable in term. See sect. 3, 5; and see schedule of act, 2 W. 4, c. 39.

(*l*) 2 W. 4, c. 39, sections 10 & 12.

(*m*) R. M. 3 W. 4, rule 10; *semble*, 1 Burr. 408, and post, Chap. V.

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Requires appearance of bail above, to process, even in vacation.

The exceptions as to certain proceedings, especially between 10th August and 24th October.

Provides that bail and appearance must be perfected during that time.

But no declaration or pleading to take place between those days.

of *summons, capias* or *detainer*, issued by authority of that act, shall be served or executed on any day, whether in term or vacation, all *necessary proceeding to judgment and execution, may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution* thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation. (n) And then follow *certain exceptions*, viz. that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas day, or any day appointed for a public fast or thanksgiving, in either of such cases the *following day* shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter day, then and in every such case, the Wednesday after Easter day shall be considered as the last of such eight days. *Provided* also, that if such writ shall be served or executed on any day between the 10th day of August and the 24th day of October in any year, special bail *may* (o) be put in by the defendant in bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days. (o) *Provided* also, that *no declaration or pleading after declaration* shall be filed or delivered between the said 10th day of August and the 24th day of October. And by G. R. M. 3 W. 4, r. 12, in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October, as if the declaration or preceding pleading had been delivered or filed on the 24th October. And it has been decided, that if a defendant obtain enlarged time for pleading previous to the 10th August, but which does not expire on that day, he is not entitled to the remainder of the enlarged time after the 24th of October for the purpose of pleading. (p) And if the time for pleading does not expire until after the 10th August, although it may be enlarged time, still the defendant is to have the same time for pleading as if the declaration had been filed or delivered on the 24th October. (q)

(n) But see *infra*.

(o) If, therefore, a defendant be arrested between the 19th of August and 24th of October, he *must* put in and justify bail before a judge at chambers, within the same time, and in the same

way, as in any other part of the vacation. *R. v. Sheriff of Middlesex*, 2 Cr. & M. 333; and the same as to a *common appearance*.

(p) *Trinder v. Smedley*, 3 Dowl. 37.

(q) *Wilson v. Bradstocke*, 2 Dowl. 417

The wording of the proviso respecting the defendant's putting in bail, or entering an appearance between the 10th of August and 24th October is obscure, (r) for the word *may* would only seem to give the defendant a *liberty* or power which he unquestionably would have without the proviso; the word *may*, however, applies only to the *plaintiffs* entering an appearance according to the statutes between those days; for as respects *defendants*, it is now settled that they *must enter their appearance, and put in and perfect special bail* at a judge's chambers, between the 10th August and 24th October, precisely as if the act contained no exception whatever, and the exception in the act is construed only to apply to *declarations* and *pleadings* after declaration, which are *not* to be filed or delivered during the excepted time. (s)

The result, therefore, of the enactment is, that the 11th sect. with its exceptions, is confined to mesne process, and provides, that if the last of the eight days after service or execution of mesne process fall on a Sunday, Christmas-day, or public fast or thanksgiving day, the next day is to be considered the last of the eight days; and if the last of *such eight days* shall fall between Thursday before and Wednesday after Easter day, then such Wednesday shall be considered the last of such eight days, and the defendant has so many additional days to appear or put in bail; but that as respects appearance and bail above, they are to take place between the 10th August and 24th October, the same as at any other time of the year; though as regards *declarations*, and other *pleadings*, they are not to be filed or delivered between the 10th August and 24th October.

The rule, Michaelmas term, 3 Wm. 4, r. 12, in furtherance of the exception in 2 Wm. 4, c. 39, stat. 11, respecting any declaration or other pleading between the 10th August and 24th October, orders that "in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October, as if the declaration or preceding pleading had been delivered or filed on the latter day.

Rule M. T. 3 W. 4, r. 12, ordering that if time for pleading shall expire between 10th August and 24th October, defendant shall have as much time after the latter day as he had on 10th August.

The principal consequences of these alterations is, that now, The principal

(r) Per Lord Lyndhurst and Bayley, B. in *Rex v. Sheriff of Middlesex*, 2 Cromp. & M. 335, and see 1 Archbold, Pr. C. P. [16].

(s) *Rex v. Sheriff of Middlesex*, in *Wiltshire v. Wright*, 2 Cromp. & M. 335.

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result of the
modern altera-
tions, and what
exceptions.

subject to such few exceptions, a plaintiff may *issue his process*, insist on an appearance or bail above, *declare*, give notice to plead, demand plea, and sign judgment for want of a plea, or in case of a plea in due time, proceed to issue, and even trial, and judgment, and execution, *in vacation*, if the requisite number of days essential to intervene between each stage of the cause will allow, *at any time*, (excepting between 10th August and 24th October,) and which is now strictly the only *actual vacation*, (and is confined to *declarations and pleadings* thereon,) and as to *putting in bail* in bailable actions, and the *entering an appearance* by the defendant or the plaintiff, the same must be done even during that excepted time. (t)

Sittings in Mid-
dlesex and
London after
term

We have seen that the 11 G. 4 and 1 W. 4, c. 70, s. 7, prohibits the appropriation of more than *twenty-four* days, exclusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than *six* days, exclusive of Sunday, after any Easter term, to be reckoned consecutively, immediately after such terms, to sittings in London and Middlesex, *for the trial of issues of fact* arising in any of the said Courts, with the exception of trials at bar, or particular days of trial appointed by consent to take place during a vacation, but not pending the twenty-four days, so that only *twenty-four days* can now, in any case be appropriated, in London and Middlesex, for trials after term, usually *twelve* for Middlesex and *twelve* for London.

Time for trans-
acting business
during the cir-
cuits.

As regards the *Circuits*, certain days are usually appointed in anticipation for the circuit town of each county. And the 3 G. 4, c. 10, enacts, that when commissions shall not be opened and read at any place specified on the day named therein, the same may be opened and read on the following day, not being Sunday, or if a Sunday, then on the next succeeding day. (u) If the business on the civil side in one county be not finished before the commission day for the next county, the remaining causes cannot then be tried, but must be made *remanets*, and it is only at the last county town on the circuit that it is *certain* that all the business will be completed.

Enactment of 3

The last act tending to destroy the distinctions between

(t) See exceptions in 2 W. 4, c. 39, s. 11; 1 Arch. Pr. C. P. [16].

(u) See stat. 3 G. 4, c. 10, Clitty's Col. Stat. 1061.

terms and vacations, was the 3 & 4 W. 4, c. 67, s. 2, (passed 28th August, 1833,) whereby, after reciting that by the existing law and the practice of the Courts, actions may be brought, and issues may proceed to trial and final judgment, in vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding term, *but that jury process and writs of execution are now by law tested in term time only*; therefore enacts that the writ of *venire facias juratores* may be tested on the day on which the same is actually issued, and may be made returnable *forthwith*, and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested in term or vacation, on any day subsequent to the teste of the *venire facias juratores*, and that *all writs of execution* may be tested on the day on which the same are issued, and shall be made returnable immediately after execution thereof; provided that when a trial at bar is had, the writ of *venire facias juratores* shall be made returnable as heretofore.

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& 4 W. 4, c. 67, s. 2, that all jury process and writs of execution may be tested in vacation, and returnable immediately after the same have been executed.

And the 2 W. 4, c. 39, s. 15, authorizes the Court, or a judge in vacation, to make orders for the sheriff's return of writs of *execution* and *mesne process* in the vacation, subject to an attachment in the next term. And that act, as well as the 3 & 4 W. 4, c. 67, s. 2, extends as well to judgments and proceedings that had commenced before the passing of those acts as since; and it is no excuse to a sheriff for not obeying any such order, that he could not open the treasury and file his return without paying an extra vacation fee.(x) But the circumstance of proceedings being now sustainable in the vacations, and even the abolition of the necessity for a rule to enter the issue, has hitherto been considered as not altering the previous practice and time of moving for a judgment in case of a nonsuit, though an alteration in that respect is in contemplation.(y)

A judge's order may be for return of all process in vacation.

As respects all acts that *must be transacted in banc*, the distinctions between term and vacation continues, and if a rule has not been determined upon in the term in which it was obtained, it must, on the motion of counsel, or by a distinct rule, be *enlarged* until the next term, or if not, it must, by a distinct motion, referring, nevertheless, to the prior affidavit and rule, be *revived* before its merits can be discussed.(z)

Of the necessity for enlarging or reviving rules of one term until or in the next.

(1) *Rex v. Sheriff of Surrey*, 3 Dowl. 184; *Williams v. Edwards*, id. 183.

(2) *Smith v. Collier*, 3 Dowl. 100.

(y) *Butterworth v. Crabtree*, 3 Dowl.

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Terms and vac-
ations how
altered or af-
fected by mo-
dern rules.

Many of the modern technical rules founded on 11 G. 4. and 1 W. 4, c. 70, s. 11, or the subsequent acts, also materially tend to put an end to the ancient distinctions between the terms and vacations, and the essoin days and the first day of full term. Formerly a declaration in ejectment must have been served *before the first essoin day* of each term to entitle the plaintiff to an appearance and plea of that term; but now the rule T. T. 1 W. 4, 1831, authorizes the service of such declaration before the first day in term; and by rule H. T. 2 W. 4, A.D. 1832, when a rule to return a writ expires in vacation, the sheriff is to file the writ at the expiration of such rule, or as soon after as the office shall be open.

The rule M. T. 3 W. 4, 1832, provides, that in case the time for pleading to any declaration or answering any pleading, shall not have expired before the 10th August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October then next, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October, but in such cases it shall not be necessary to have a second rule to plead, &c. The object of this rule was to secure a *complete* and perfect vacation, holiday and state of repose, between the 10th August and 24th October, without the necessity for any part of that time being occupied by practitioners even in *preparing* for a renewal of active measures to commence immediately after the latter day, excepting as regards the entry of an appearance and putting in and perfecting bail. (a) But the following rule provides, that in case a judge should make an order in vacation for the return of any writ issued by authority of 2 W. 4, c. 39, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* on *any day* in vacation, and such order shall have been duly served but not obeyed, and the same shall be made a rule of Court in the next term, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, *whether the thing required by such order shall or not have been done in the meantime.* (b) Where a writ issued in vacation, and a declaration was delivered, and rule to plead given in the same vacation, but the plaintiff did not sign judgment until the ensuing term, it was held that it was not necessary to give a new rule to plead in that term. (c)

(a) *Ante*, 97.

(b) Rule M. T. 3 W. 4, r. 13, 1833.

(c) *Mould v. Murphy*, 1 Crompt. & M.

495; and *Fagg v. Borsley*, 6 Legal Observer, 478; *Tidd's Supp.* 1833, p. 127.

Lastly, The Rule 2 of H.T. 1834 as to *pleading*, puts an end to the necessity for entries of continuances by way of *imparlance*, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, and directs that they *shall* not be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained; and rule 3 directs, that *all judgments*, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, (usually identified as to time by *taxing* costs,) and shall not have relation to any other day, provided that it shall be competent for the Court to order a judgment to be entered *nunc pro tunc*.(c) This rule altered the antecedent legal fiction, that a judgment by bill related to the first day in full term,(d) and that a judgment by original related to the essoin day,(e) and has materially altered the practice in other respects; as, for instance, since that rule an affidavit, on which to obtain leave to enter up judgment on an old warrant of attorney, need not shew that the party was alive in full term.(f)

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Rule 2, H. T.
4 W. 4, A.D.
1834.

It will thus be seen, that all or most of the *technical* distinctions between term and vacation, essoin days and general return days, or return days certain, are now annulled, as they affected most *personal* actions; but still whenever the *full Court* in fact interfered, as in giving judgment on argued demurrers, special cases, special verdicts, new trials, (except for mere irregularity,) motions for criminal informations, special rules, &c. then the proceeding can only take place during the terms, and not in vacation. And as the Uniformity of Process Act, 2 W. 4, c. 39, extends only to certain *personal* actions, such as assumpsit, covenant, debt, detinue, case, trover, and trespass, originally commenced in one of the superior Courts, and not to proceedings in scire facias (though in some respects a personal action,) nor to actions of replevin, which are removed from the County Court, nor to *real* or mixed actions, such as dower, quare impedit and ejectment,(g) it will still be necessary to keep in view the enactments of 11 Geo. 4 and 1 Wm. 4, c. 70, and 1 W. 4, c. 3, s. 1, 2, 3, as to general return days and other particular days in term, excepting in some instances relative to

The general result.

(c) *Bragner v. Langmead*, 7 T. R. 20; *Calvert v. Tomlin*, 5 Bing. 1; *Mara v. Quin*, 6 T. R. 6; *Lawrence v. Hodgson*, 1 Young & Jer. 368.

(d) *Greenway v. Fisher*, 7 B. & C. 436; *Haswell v. Thorogood*, id. 705.

(e) *Whitaker v. Whitaker*, 8 B. & C.

768; *Turner v. Davis*, 2 Saund. 5th ed. 148.

(f) *Cockman v. Hellyer*, 1 Bing. N. C.

1.

(g) *Doe d. Gillett v. Roe*, 4 Tyr. Rep. 649.

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the action of ejectment, as in the rule of T. T. 1 W. 4, A. D. 1831, which authorizes the delivery of a declaration in ejectment at any time before the first day in full term, which previously must have been delivered before the essoin day. The consequence is, that a declaration in ejectment in the Exchequer is still to commence and conclude with the usual *quo minus* clauses, because neither the statute for the uniformity of process in *personal* actions, nor the general rule of M. T. 3 W. 4, r. 15, prescribing the forms of commencing and concluding declarations in *personal* actions, extend to the action of ejectment; (h) and for the same reason it is not necessary to entitle a declaration in ejectment of a term, or of any particular day in a term, but it suffices to entitle it of any day, because the rule of H. T. 4 W. 4, r. 1, is confined to *personal* actions, and does not extend to actions of ejectment. (i)

What acts must
still be trans-
acted in term
time.

We have necessarily, in examining the several branches of jurisdiction into which such Court has, for the despatch of business, been subdivided, considered in some degree the difference between the acts of the whole Court to be exercised only in term time, and those of a single judge sitting in the Practice Court or at chambers in term or vacation, and to those pages we must here refer. At *common law*, or at least without express enactment, neither the judges constituting the whole Court, nor any judge thereof, could do certain acts otherwise than during one of the four terms. Thus even bail could not justify *at chambers* during term time, excepting by consent; (j) and in *vacation* bail could not be justified at all without consent, so that if a party were imprisoned he could not be released until the next term before the passing of the 43 G. 3, c. 46, s. 6, and which only applied to *actual prisoners*, and not to parties at large; and consequently if a defendant's bail were going abroad in vacation time, he could not have them first justify in vacation before the 1 W. 4, c. 70, s. 12. So no rule could or can be discussed in vacation unless by consent. But now, *principally* under the statute of 2 W. 4, c. 39, s. 11, *all proceedings* in a cause, excepting those that must of necessity be decided upon in *banc* or in the *Practice Court*, may be taken and had in and during the vacation; and the expedients of sham pleading or other devices "to get over the term," as was the technical expression, have been defeated, excepting in a few instances of actions commenced towards the end of a

(h) *Doe d. Gillett v. Roe*, 4 Tyr. R. 649.

(j) *Hawkins v. Plover and Hart*, 2 Bla.

(i) *Doe d. Ashman v. Roe*, 1 Bing. N. Rep. 1064; Tidd, 263. C. 253.

term, and to be tried at the sittings in London and Middlesex, when the time in general properly allowed to a defendant to prepare his plea, and the time consumed before issue can be joined, and a proper notice of trial be given for the sittings in London or Middlesex after term, may delay a trial until in or after next term. But it can rarely occur even in the issuable terms, when the venue is laid in the *country*, that a defendant can by any pleading or device, however ingenious, prevent a trial at the next *immediate* assizes, except by *demurrer* precluding a trial; but upon which, unless it be well founded, judgment against the defendant will as of course be obtained in the next term. The recent acts, however, principally relate to certain proceedings in *personal* actions, and there are still many cases in which writs, as a *certiorari*, *must* be tested in *term*. (k)

2. Before these recent enactments and rules thereon, as recited in 2 Wm. 4, c. 39, sect. 11, no proceedings could be effectually had on any writ returnable within four days of the end of the term, until the beginning of the next term, (l) for in that case, if the defendant appeared and the plaintiff delivered his declaration, the defendant was not obliged to *plead* until the first four days of the next term, but was entitled, as of course, to an *imparlance*, a term designating a right upon which, in the older works on practice, much learning will be found. (m) So, if a writ were returnable in one term, and the declaration was not delivered before the *essoin* day of the next, the defendant might *imparle* or delay his plea until the third term, provided he perfected appearance or bail in the first term. (n) It will be observed that neither of the modern enactments mention *imparlances*; and therefore it was for some time supposed, and even decided by a judge at chambers, that there were cases in which the right to an *imparlance* may still continue. (o) Though it was at first supposed that as the acts were silent respecting *imparlances*, a defendant might still be entitled to an *imparlance*, where a plaintiff *declared in vacation*, notwithstanding this act; (o) yet it has since been determined

2. *Imparlances* in certain actions impliedly abolished.

(k) See 9 Legal Observer, 299.

(l)* *Ante*, 95. The general rule of Mich. term, 1 W. 4, A.D. 1831, however, enabled a plaintiff to declare and insist on a plea of the same term upon any writ returnable any day of the term, provided the declaration was delivered on or before the last day of the term.

(m) Tidd, 465, 466, 467; Rule Trin.

term, 5 & 6 G. 2; Rule Mich. 10 G. 2, reg. 2; Rule Trin. 22 G. 2, in K. B.; Rule Hil. term, 35 G. 3, in C. P.; Rule M. T. 1 W. 4, A. D. 1830, Exchequer.

(n) Tidd, 466, 467.

(o) *Frean v. Chaplin*, 2 Dowl. 523, observed upon in *Wigley v. Tomlins*, 3 Dowl. 7; and see Tidd's Supp. A.D. 1833, p. 127.

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in banc, after a conference with the judges of the three Courts, that giving a plaintiff an *absolute right to proceed in vacation* impliedly took away all right to an *imparlance*, which, if allowed, would annul such right. (q)

3. Of Sundays
and other dies
non juridici, and
of holidays and
hours of attend-
ance

3. At *common law Sunday* was always considered *dies non juridicus* as to process, though deeds and other acts not in the ordinary way of business may be executed on that day. But process by original, when a general return day fell on a Sunday, might be returnable *nominally* on that day. (r) But that practice is now prevented, and writs that have any return day, as a distringas and proceedings to outlawry, must now be returnable on a *day certain* in term time, not being Sunday. (s) At common law, if an act be stipulated to be or is to be done on a day of a month, which happens to fall on a Sunday, the party has the next following day to perform it; and the legislature and the Courts appear to have considered such allowance of the following day as proper. (t) But by the *mercantile* law and by statute, as regards bills of exchange or promissory notes, if payable on a Sunday, they become due the day before, though, if dishonoured, notice need not be given until the following Monday. (u) And if a letter giving notice of the dishonour be received on Sunday, it need not be opened till the Monday, and it is to be considered as only having been received on the latter day. (v)

The 20 Car. 2, c. 7, prohibiting secular affairs in general on a Sunday, and considered to be in affirmance of the common law, in sect. 6 enacts, (y) "that no person shall on *Sunday* serve or "execute, or cause to be served or executed, any writ, pro- "cess, warrant, order, judgment, or decree, (except in cases "of treason, felony, or breach of the peace,) but that the ser- "vice thereof on Sunday shall be void to all intents and pur- "poses whatsoever; and the person so serving or executing "the same shall be liable at the suit of the party grieved, and "to answer damages to him for doing thereof, as if he had "done the same without any writ, process, warrant, order, "judgment, or decree at all." (z)

(q) *Nurse v. Goeting*, 3 Dowl. 157, 158; *Wigley v. Tomlins*, 3 Dowl. 7; and see 9 Legal Observer, p. 20 to 22, 226. But imparlances may in some actions for some purposes still continue, Tidd's Supp. 1833, p. 127.

(r) Tidd, 106.

(s) 1 W. 4, c. 3, s. 2; 2 W. 4, c. 39, s. 4, 5.

(t) See 11 G. 4 and 1 W. 4, c. 70, s. 6.

(u) 7 & 8 G. 4, c. 15; *Tassel v. Lewis*, Lord Raym. 745. The same law as to a Jewish festival, *Lindo v. Unsworth*, 2 Campb. 602.

(v) *Bray v. Hadwen*, 5 Maule & Selw. 68; *Wright v. Shawcross*, 2 Bar. & Ald. 501.

(y) Chitty's Summary, Pr. 18, 19, tenth line.

(z) See note on this act, Chitty's Col. Stat. 1039. There may be a *recaption*

If process by original were returnable on a Sunday, it must have been executed before midnight of Saturday; (a) and a service of any process on a Sunday is so absolutely void that it cannot be made good by any waiver of the objection; (b) but if the defendant plead to a declaration, as that step excuses even the total want of process, it would equally waive an irregularity in the service. The statute, it will be observed, does not in express terms extend to pleadings or notices thereof, but nevertheless the service of a notice of declaration; (c) or delivery of pleadings, (d) service of notice of plea that had been filed on a Sunday, (e) or service of a copy of any rule, (f) or service on Sunday of a "countermand of notice of trial," (g) are bad; and the imperfection in the proceeding cannot be aided; (h) nor can judgment for want of a plea be signed on Sunday or any dies non. (i)

And as Sunday is not a proper day for making inquiries, it is not counted as one of the two days in a notice of justification of bail, (j) nor in a rule for judgment after verdict, (k) nor one of the four days during which a ca. sa., (l) or scire facias, (m) to fix bail must lie in the office. And yet Sunday, unless it be the last, is counted as one of the days in a notice to plead, and one of the four days in a rule to plead. (n)

Before the act 3 & 4 W. 4, c. 42, s. 43, which abolished the numerous holidays, and reduced the dies non holidays to Sundays, and Easter Monday and Tuesday, Christmas day, and the three following days, it was held that a dies non, un-

Of other dies non and holidays, and what abolished. (o)

after a negligent escape, though not after one that has been voluntary, 6 Mod. 231; *Atkinson v. Jameson*, 5 T. R. 25, nor after a release without searching, when there happens to be a detainer, or another writ in sheriff's office, *id. ib.* But there may be a retaking on a Sunday under an escape warrant, *Parker v. Moor*, 2 Salk. 626, or on Lord Chancellor's warrant or order of commitment for a contempt, 1 Ath. 55, and by bail above, 6 Mod. 231, though not by bail to the sheriff, *Brooks v. Warren*, 2 Black. R. 1273; nor on an attachment for non-performance of an award, 1 T. R. 265; nor on a justice's warrant for non-payment of a penalty on a conviction. *id. ibid.*; nor can a rule nisi for an attachment for non-payment of money be served on a Sunday, *M'Leham v. Smith*, 8 T. R. 66.

(a) *Leveridge v. Plaistow*, 2 Hen. Bla. 29.

(b) *Taylor v. Phillips*, 13 East, 155; 8 East, 547.

(c) 1 H. Bla. 628.

(d) 1 H. Bla. 629; 8 T. R. 86.

(e) 8 East, 547.

(f) 8 T. R. 86; Tyr. 218, 481, 499.

(g) Tyr. 757.

(h) 1 H. Bla. 629; 13 East, 155; 8 East, 547.

(i) 9 Bar. & Cres, 245.

(j) Tidd, 260.

(k) Tidd, 905.

(l) 1 B. & Ald. 528; 6 M. & S. 138.

(m) *Semble*, 7 Bing. 109.

(n) 2 Salk. 624; 11 East, 272; so that supposing the four days were intended to allow time for preparing a plea, special pleaders are supposed to be less observant of the sabbath than the rest of mankind.

(o) For an account of the former different holidays, and when they were commanded or allowed to be kept on different days in the year, see Sellon's Prac. and Tidd's Prac. 9th edit. 55 to 58. And as to the remedies for refusing to transact business at any office, or demanding extra fees, Tidd, 55 to 58.

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less a Sunday, was a day for acts that did not require to be, nor were supposed to be done in Court, as putting in bail; (*p*) and if the last of the four days to plead were a *dies non*, as the Purification, the defendant must, nevertheless, have pleaded on or before that day, and he had not another day. (*q*)

By the 3 & 4 W. 4, c. 42, s. 43, passed 14th August, 1833, reciting that the observance of *holidays* in the *Courts* of Common Law during term time, and in the *offices* belonging to the same, on the several days on which holidays were then kept, was very inconvenient, and tended to delay the administration of justice, therefore enacted, that none of the several days mentioned in 5 & 6 Ed. 6, c. 3, shall be observed or kept in the said *Courts*, or in the *offices* belonging thereto, except *Sundays*, the day of the Nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week." Good Friday, though formerly a holiday, (*r*) is no longer so; Sundays and Christmas day, the three following days, and Easter Monday and Tuesday, being the only *general* holidays allowed in the above statute. But the general rule of Easter term, 2 W. 4, A. D. 1832, orders, that the days between Thursday next before, and the Wednesday next after Easter day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trials, and notices of inquiry in any of the Courts of Law at Westminster.

Hours of attendance at Seal Office and other offices.

The enjoined *hours* of attendance at the *Seal Office*, (being the office for sealing writs issued out of K. B. and C. P.) are from eleven in the morning till two in the afternoon, and five to seven in the evening, during each term, and for *ten* days after every issuable term, and one week after every other term, and from eleven in the morning till three in the afternoon at all other times. (*s*) The remedy for not opening the offices at the proper time, or for refusing to perform duty, is an action on the case, or a summary application to the Court. (*t*)

(*p*) 5 T. R. 176; T. 118.

(*q*) 2 Hen. Bl. 616; Tidd, 474.

(*r*) Tidd, 55.

(*s*) R. T. 1656, reg. 7, K. B. R. T. 9 W. 3, C. P.; Tidd, 54; Rule Trin. 54 G. S. K. B.; 3 M. & S. 163; 5 Taunt. 702. But it will be observed that the 5 & 6 Ed. 6, c. 3, did not name Good Friday, so that the statute 3 & 4 W. 4, c. 12, s. 43, does not expressly prohibit the observance of that day as a holiday. The statute 7 & 8 G. 4, c. 15, declared Good Friday to be a *dies non* for business, so

that bills of exchange otherwise falling due on that day should become due on the preceding Thursday, though notice of dishonour need not be given until the Saturday. The anecdote of Dunning telling Lord Mansfield, when he declared he would try causes on Good Friday, that he would be the first judge who had transacted business on that day since Pontius Pilate, will be remembered.

(*t*) Tidd, 33; 7 T. R. 386; 7 Taunt. 182; 1 Hen. Bl. 105.

In the *Common Pleas* the hours of attendance at the Office of the Prothonotaries, No. 1, King's Bench Walk, Temple, of the Treasury Keeper at the Treasury, Westminster Hall, at the Warrant-of-Attorney Office, now at No. 1, New Court, are the same as at the Seal Office, viz. from eleven to two, and from five to seven during each term, and ten days after every issuable term, and one week after every other term; and from eleven to three at all other times. (u)

In the *Exchequer*, the rule of M. T. 2 W. 4, (x) requires the Exchequer Office of Pleas to be kept open for business *during term, and one week after every term*, (Sundays, Christmas-day, Good Friday, Easter Monday, Ascension day, and Midsummer day, and the days appointed for public feasts, thanksgivings, or fasts excepted,) (y) from eleven o'clock in the morning till three o'clock in the afternoon, and from six till nine o'clock in the evening, *and at other times*, from eleven o'clock in the morning until four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed. (z) The distinction of Monday and Tuesday, not being days of business on the plea side, no longer prevails in the Exchequer. (a) *Wednesdays* in term time have been recently declared to be special paper days, excepting when the first and last of either terms. (b)

A "*year and a day*" is a period particularly recognized in the law as regards some proceedings on an action as well as otherwise. Thus, if a judgment in an action be reversed, a party, notwithstanding the lapse of time mentioned in a statute of limitations pending that action, may commence a fresh action within a year and a day after the day of such reversal. (c) The day was probably added by our ancestors to remove any doubt as to the completion of the year by inclusive or exclusive computation of the first or last day. (d) So, after a year and a day had elapsed from the day of signing a judgment, without any intervening writ of execution or other proceeding thereon, no writ of execution could afterwards be issued, and the only remedy was by action of debt on the judgment, until the 13 Edw. 1, c. 45, gave a writ of *scire facias* to revive the judg-

4. Year and a day, year and half year, &c. how construed, &c.

(u) Rule Trin. T. 54 G. 3, and 1 Hen. Bla. 105.

(z) This rule virtually annuls that of Mich. term, 1 W. 4; 1 Tyrw. R. 156; Jervis Rules 3.

(y) The statute 3 & 4 W. 4, c. 42, s. 43, abolishes all holidays excepting Sunday, Christmas-day, and three following days, and Easter Monday and Tuesday, *ante*, 105.

(z) In *Tate v. Bedford*, 3 Dowl. 219, it was considered that the *afternoon* in the Exchequer for the purpose of signing a judgment does not commence till *three o'clock*.

(a) Price Pr. 73.

(b) Price Pr. 329.

(c) 4 Bla. Com. 315, 335; *Kuddock's case*, 6 Coke, 25, 1 Lev. 310.

(d) Palmer's Pr. Lords, 175, note.

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ment; and after judgment on scire facias, execution may be issued. (d) The year is to be computed from the day of signing the judgment, exclusive of that day, (e) and the words *infra annum*, in 13 Edw. 1, are to be reckoned by calendar months, and not by terms. (f) But by express agreement, as is usually the case when a warrant of attorney is executed as a collateral security, the necessity for a scire facias may be avoided. (g)

So by the general rule of Hil. T. 2 W. 4, 1832, rule 35, "a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable." But as writs of summons and *capias*, since the 2 W. 4, c. 39, have no return day, the year would probably be calculated to commence from the eighth day *inclusive* from the execution of the process, (h) or according to another author, within a year from the very day when the process was served or executed. (i) So, before the recent enactments, it was considered, that after four terms from the issuing the first writ, or rather *from the return day* of such writ, without any intervening proceeding thereon, or the like time had elapsed from the return day of a pluries or other continued process, there must have been an entirely fresh writ, and not mere continued process. (k)

Six months, we have seen, will sometimes be construed to mean *half a year*, and not merely six *lunar* months. (l) According to a French author, a quarter or half a year signifies three or six months. (m)

5. Month, how
calculated.

5. A *month*, when applicable to the practice of the Court, or to *temporal* matters, or used in a statute, in general imports a *lunar* month of four weeks, or twenty-eight days; (n) but in ecclesiastical, maritime, or mercantile affairs, it imports a *calendar* month, even in a formal contract, (o) varying in the number of days according to the calendar. (p) It has been held, that a *calendar* month's notice of action, required by 24

(d) Bac. Ab. Execution, II. ; Tidd, 1103.

(e) Barnes, 197 ; Tidd, 1103.

(f) 1 Stra. 301 ; 1 Chit. Rep. 669, n.

(g) 2 Bar. & Cres. 242 ; Tidd, 1104.

(h) 1 Archbold's Pr. by T. Chitty, 186, edit. 1831, p. 218.

(i) 1 Arch. Pr. C. P. [68].

(k) 3 Bar. & Ald. 271 ; Tidd, 147, 421.

(l) *The Bishop of Peterborough*, Cro. Jac. 167 ; *ante*, vol. i. 775 ; vol. ii. 69.

(m) 1 Pardessus, 354.

(n) *Ante*, vol. i. 775 ; vol. ii. 69, 149 ; 6 Term Rep. 224 ; *Creswell v. Harris*, 2 Sim. & Stu. 476.

(o) Willes, 588 ; 1 Maule & Sel. 111 ; 6 Maule & Sel. 227 ; *ante*, vol. i. 775.

(p) These may be kept in recollection by the doggerel verses :

"Thirty days hath September,
April, June, and November;
All the rest have *thirty-one*,
Except February alone,
Which claimeth just eight and a score,
And every leap year one more."

It may appear ridiculous to refer to these, but great utility has been derived from assistance to the memory on the plan of Gray's *Ars Technica Memoria*.

G. 2, c. 44, to be given to a justice of the peace, *begins on the day the notice is served, inclusive* thereof; and that therefore if notice be served on the 28th of April, it expires on the 27th of May, and the action *may* be commenced on the 28th of May; (g) though it would seem on principle and the general rule of construction presently noticed, (especially as the statute in terms requires *at least* a calendar month's notice,) (r) the first day ought to be excluded, so that the party to whom the notice is addressed should, according to the expressed intention of the legislature, have the *full time* by days of twenty-four hours each. And it has been recently held, that the seven days allowed for making the oath and submitting to examination antecedent to an action against the hundred, are to be calculated *exclusive* of the day on which the damage was committed; (s) and in construing the 2 W. & M. sess. 1, c. 5, authorising a landlord to sell a distress "after such distress and notice as aforesaid, and expiration of the said *five days*," the day of making the distress is to be excluded, and after allowing the five following clear days, the sale should not be until the seventh day. (t)

6. Before the recent rule of Hil. T. 2 W. 4, c. 8, for regulating the *practice* in the three superior Courts of law, there was much contradiction and uncertainty when a statute or rule declared affirmatively that some notice or step should be taken, a month or other time, before an action should be commenced, whether the day on which the act took place, or the day of giving such notice or taking such step should be included or excluded in the calculation. In general the rule was, that the computation from an act done, must *include* the day on which it was done; (u) but that *from* the day of the date of the act, *excludes* the day. (x) A distinction has also been taken between cases where the injury or matter complained of was done *to the plaintiff himself* or in his presence, so that he must know it immediately, on the same day; and cases where the plaintiff was absent at the time, and might not hear of it till afterwards. In the first case, if he were required to give a notice, or commence his action within a specified time afterwards, then the

6. Day, when or not excluded, and time, how computed in general.

(g) *Ante*, vol. ii. 69; 3 T. R. 623; S. C. 2 Camp. 294.

(r) 4 Man. & Ryl. 300, n. (b); 5 Bing. 339.

(s) *Pellew v. Inhabitants of Weyford*, 9 Bar. & Cres. 134; 4 Man. & Ry. 130,

(t) *Semble*, *Pitt v. Skew and others*, B. & Ald. 208, and *ante*, vol. i. 663.

(u) 3 T. R. 623; 3 East, 407; Hob. 189; 4 Moore, 465.

(x) 2 Camp. 294.

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day on which the injury or act was committed, was to be *included*, but in the latter case it was to be *excluded*; that distinction was first taken in equity, and was afterwards adopted in Courts of law. (*y*) Of late the general rule of construction seems to have been, to *exclude* the first day. (*z*)

The general rule Hil. T. 2 W. 4, excluding first day and including the last.

Now as respects the *practice* of the superior Courts of law, it has been fixed by the general rule of all the Courts, Hil. T. 2 W. 4, reg. 8, (*a*) which ordered, that “in all cases in which any particular number of *days*, not being expressed to be clear days, is prescribed by the *rules* and *practice* of the Courts, the same shall be reckoned *exclusively* of the *first* day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, (*b*) or a day appointed for a public fast or thanksgiving. in which case the time shall be reckoned *exclusively* of that day also.” (*p*)

7. Hour of the day.

Process serviceable may be served at any hour, even at midnight; (*c*) although a distress for rent must be made after sunrise and before sunset, so that the rent, if tendered, may be readily counted. (*d*) An arrest also may be made at any hour of the night, (*e*) though not on a Saturday night, at any instant after twelve o'clock. (*f*) With respect to other proceedings before the recent general rules, there were particular rules for each Court, prescribing ten o'clock at night in K. B., (*g*) and nine o'clock in C. P. (*h*) and Exchequer, (*i*) as the latest hours for serving rules, notices, &c. But now the General Rule, Hil. T. 1832, reg. 50, and which extends to all the Courts, orders that “*service of rules and orders, and notices, (j) made before nine at night, shall be deemed good, but not if made after that hour.*” Upon the above former rule in K. B., it was decided that a service after the fixed hour was wholly unavailing, and that although it was received and read, and returned on the next day, it was not good as a

(*y*) 15 Ves. 248; 9 B. & Cres. 131, 603; 3 Young & J. 1 and 16; 4 Man. & R. 300, b. As to omission, 3 Young & J. 80.

(*z*) *Id. ibid.*; 4 Man. & Ry. 300, b; 9 B. & Cres. 134, 603. It is so when time has been given for pleading, *Pepperell v. Barrell*, 4 Tyr. 811.

(*a*) See the rule, 8 Bing. 307, 308; and *post*, Appendix.

(*b*) By 3 & 4 W. 4, c. 42, s. 43, all other holidays are now repealed.

(*c*) 2 Chitty's Rep. 357; 1 Bing. 66; Tidd, 168, 499.

(*d*) *Leveridge v. Plaiter*, 2 Hen. Bla. 29. We have seen what is night as re-

gards the offence of *Burglary, ante*, vol. i. 411. The act 9 G. 4, c. 69, s. 34, against *night* poaching, defines night to be between an hour after sunset and one hour before sunrise.

(*e*) 9 Coke, 66.

(*f*) *Supra*, n. (*d*).

(*g*) R. M. 41 G. 3, K. B.; 1 East, 132.

(*h*) R. E. 10 G. 2, C. P., 1 Bing. 66; 2 Taunt. 48.

(*i*) R. M. 1 W. 1.

(*j*) This extended to a notice of motion for judgment as in case of a *consuit*, when that notice was necessary, 2 Taunt. 48.

service on the latter. (k) And upon the rule of the Common Pleas, it was held that the delivery of a notice sealed up in a letter before nine o'clock in the evening, in the absence of the attorney to whom it was addressed, was no service but from the time when the letter was actually opened. (l)

In some cases, in order to secure an adequate number of hours, so as to enable the opponent to inquire, as in notices of the justification of bail served on one day, of the intention to justify bail on the morning of the next day but one after the receipt of such notice, it must be sworn that such notice was served *before eleven o'clock* on the day of the service, but which rule does not apply when there are *two clear days* intervening between the time of service and the time of justifying; (m) and where there is a rule or order for further time to justify, it suffices to serve the same before *three o'clock* of the afternoon of the day when it was made. (n)

In case of a *demand of plea*, &c., which expires immediately after the expiration of *twenty-four hours by fractions*, from the exact time of the demand, it sometimes becomes material to ascertain the *precise instant* of the demand, (n) excepting in the Common Pleas, where the plaintiff cannot sign judgment for want of a plea, until the opening of the office in the afternoon, after the twenty-four hours. (o) So as a plea in bar may be delivered at any time before judgment has been actually signed, it sometimes becomes difficult, on contradictory affidavits, to ascertain the precise instant when the plea was delivered at the office of the plaintiff's attorney, and when the judgment was actually signed at the office. (p)

In other respects the hour of the day is not material, and although it is an ancient maxim that in law there is no fraction of a day, (q) yet that fiction and doctrine no longer prevail, when it becomes essential for the purposes of justice to ascertain the exact hour or minute; (r) and if a tender be made at any instant before a writ issues, although on the same day, it may be pleaded; (s) and if a sheriff actually seize the goods of

Fraction of a day.

(k) E. T. A. D. 1829, K. B., 2 Chit. R. 88; Tidd, 261.

(l) 3 Taunt. 234.

(m) Tidd, 26; and see *post*, Bail.

(n) Chitty's Summary, 94, 95.

(o) Tidd, 477.

(p) It would be advisable to provide against any such uncertainty, by a rule ordering that a plea, after the proper time, should be a nullity, or should not prevent the plaintiff from signing judgment, unless delivered before any clerk had left the office of the plaintiff's attor-

ney, for the purpose of signing judgment.

(q) 15 Ves. 257; Co. Lit. 135, 136; 9 East, 154; 4 T. R. 660; 11 East, 496; 3 Coke, 36 a.

(r) Per Lord Mansfield, 3 Burr. 1434; 9 East, 154; 3 Coke, 36.

(s) The facts were so specially pleaded, and the plea helden good in the King's Bench on demurrer; the plea stated that the writ was not issued until after eleven o'clock on a named day; and that the tender was made at an earlier hour, to wit, at nine o'clock in the morning,

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a trader, under a writ of fieri facias, at any instant of the same day, but before an act of bankruptcy had been actually committed, the levy will be deemed complete and valid. (t)

8. *Instantan.*

8. The term *Instantan* means, it is said, that the act shall be done within twenty-four hours; (u) but a doubt has been suggested by whom the account of hours is to be kept, and whether the term *instantan*, as applied to the subject-matter, may not more properly be taken to mean "before the rising of the Court," when the act is to be done in Court; or "before the shutting of the office on the same night," when the act is to be done there. (x)

Forthwith.

The term "*Forthwith*," sometimes used, seems to import that the requisite act shall be performed as soon as by reasonable exertion, confined to that object, it might be; and which must consequently vary according to the circumstances of each particular case. (y)

Peremptory.

The term *peremptory* of peremptorily is not used to denote any definite measure of time, but is rather added to some other expression, the more emphatically to signify that the time is positively or peremptorily fixed, and not to be deviated from; as occurs in a peremptory undertaking to try a cause at the next assizes, &c. The term *peremptory* is also applied to rules not heard in the term when they stood for discussion, but which are enlarged to the next term, and are then set down in a paper called the *Peremptory Paper*, and usually apportioned to be heard on several consecutive days early in the next term.

Reasonable
time.

Reasonable time. It has been sensibly observed, when remarking upon the twentieth General Rule of Hilary term, 4 W. 4, requiring a certain consent to be given *within forty-eight hours*, that the question of *reasonable time* must depend upon the character and importance of instruments required to be admitted, the number of parties interested, and the distance at which they may be situated from the person giving notice and requiring the admission; and it has been objected that in that case forty-eight hours would appear to be in most cases

and it was decided to have been well pleaded; and a case in Impey's Prac. K.B. 310, was cited, and overruled, MS.; and Chitty on Pleading, 5th ed. 1222.

(t) 8 Ves. 80; 4 Campb. 197; 2 Bar. & Ald. 366.

(u) 1 Taunt. 343; Tidd, 567, 611, 671.

(x) Tidd, 567, 611; and see 6 East, 587.

(y) Nicholls v. Chambers, 4 Tyr. 837.

too short a period within which a party should be required to give his assent or dissent. (y)

CHAP. III.
OF TERMS AND
VACATIONS,
&c.

By the rule Hilary term, 4 W. 4, 1834, rule 1, "*Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded,*" and shall bear no other time or date; and every declaration and other pleading shall also be *entered on the record* (z) made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or "date, unless otherwise specially ordered by the Court or a judge." And rule 3 orders "that all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, when in term or vacation, when signed, and shall not have relation to any other day;" but it is provided that it shall be "competent for the Court or a judge to order a judgment to be entered nunc pro tunc."

9. Time of declaring, pleading, &c. to be stated at the top of pleadings, &c.

But these rules apply only to *personal* actions commenced in the Superior Court, and do not extend to real or mixed actions, or scire facias, or replevin, removed from the County Court; and therefore we have seen that it has been recently decided that a declaration in ejectment need not be entitled of the day it was served or delivered. (a)

(y) Wordsworth's Rules of Court, 26, note (c); as to reasonable time in general, see the observations and authorities collected in Chitty on Bills, 8th edit. 366, 412, 420, 509, 800.

was pointed out and considered before the rules were promulgated; but it was not considered expedient to alter the same.

(z) The singularity in this expression

(a) *Doe d. Ashman v. Itoc*, 1 Bing. N. C. 253.

CHAPTER IV.

PRELIMINARY STEPS BEFORE COMMENCEMENT OF ACTION; AND
PRINCIPALLY OF THE RETAINER OF AN ATTORNEY—IN-
STRUCTIONS TO SUE—WHO TO BE PLAINTIFF OR DEFENDANT,
TENDER OF INDEMNITY TO A RELUCTANT PLAINTIFF—FORM
OF ACTION—OPINION OF COUNSEL—LETTER TO DEFENDANT
—CONSIDERATION WHETHER OR NOT TO ARREST THE DE-
FENDANT—AND SUBJECTS TO BE CONSIDERED BY AN ATTOR-
NEY FOR A DEFENDANT.

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CHAP. IV. THE party supposed to have been injured, having consulted an attorney of one of the superior Courts upon the right or expediency of enforcing payment of a debt or compensation for an injury, and it appearing at least *prima facie* that he has a sustainable claim, thereupon *retains*, i. e. *authorizes*, such attorney, either generally or with certain limits, to proceed against the supposed wrong-doer. When there is mutual confidence this is rarely reduced into writing, although formerly there were enactments and rules imperatively requiring the attorney's retainer or warrant to prosecute or defend to be actually filed at an early stage of the cause, under a penalty of 10*l.* for the omission. (*a*) But these in practice have long ceased to be filed, (*b*) and after verdict the want of them has been aided by statute, and after judgment by default and error brought they are allowed to be filed at any time so as to support the proceedings; (*c*) and now by rule Hil. T. 4 W. 4, A. D. 1834, rule 4, "no *entry* shall be made on record of any warrants of attorney to sue or defend." And although the 25 G. 3, c. 80,

First, Of the retainer of an attorney, and the expediency of its being in writing and explicit.

(*a*) 4 Ann. c. 16.

(*b*) Sel. Prac. 18; Tidd, 92.

(*c*) 32 Hen. 8, c. 30; 18 Eliz. c. 14; 1 Wils. 85.

(enacted merely for revenue purposes and in order the better to secure the payment of the stamp duty,) required the attorney for plaintiff or the defendant to deliver to a proper officer a stamped memorandum of the warrant to sue or defend, under a penalty of 5*l.*, yet the omission did not affect the validity of the proceedings, and as the 5 G. 4, c. 41, repealed the stamp duties on law proceedings, the 25 G. 3, c. 80, as far as regards even such memorandum, was impliedly repealed. (*d*)

But we have seen that it has been strongly urged by the highest authorities, as well at law as in equity, that it is not only *expedient* but the *duty* of every attorney- and solicitor to obtain an explicit *written retainer* signed by the client, (*e*) and it is recommended that it should also be witnessed by one or more of the client's friends, so as to avoid the possibility of insinuation that it was obtained by contrivance: and when there are to be several plaintiffs it should be signed by *all* and not by one party for himself and others, especially if they be trustees or assignees of a bankrupt or insolvent, and it should explicitly state whether or not it is to give a general or a qualified authority. For want of these precautions, where there are several parties (especially when assignees of a bankrupt), one of them may insist, and frequently with effect, that he never authorized an action, and thereby defeat the attorney's claim upon him for costs; (*f*) whilst another client will swear that he merely authorized the writing a letter for a debt or a writ without further proceeding. (*g*) The true reason why some

(*d*) And see Tidd, 96; Price, Pr. Ex. 54; Sellon's Pr. 19.

(*e*) *Ante*, vol. ii. part 3, p. 18 to 21, and Price's Prac. of all the Courts, 9 and 10.

(*f*) In a recent case, where a very respectable solicitor, retained by all the assignees as attorney to prosecute a trial, by the express authority of one of the assignees and with the seeming concurrence of the other assignees prosecuted several actions for debts to the estate and obtained verdicts, but the defendants did not pay; the master of K. B. on the solicitor's bill of costs having been referred to him, decided against the claim on the other assignees for want of proof of an *express* authority to institute the actions.

(*g*) As the bankrupt act, 6 G. 4, c. 10, s. 83, 89, implies the necessity for a meeting of creditors in some cases to authorize a suit, an attorney in such a case must take care to observe the requisites of the act; for though no ground of demurrer in equity, 3 Young & J. 578, yet the want of consent of requisite number of creditors

might be pleaded, 2 Young & J. 475. So the insolvent act, 7 G. 4, c. 57, s. 24, in some cases requires a meeting and consent of a majority of creditors to an action, 3 Bing. 203, 370; 10 Moore, 7. In these and other cases, if an attorney neglect to take such measures as are essential to secure a proper authority to proceed, his own remedy for his bill of costs may be lost or prejudiced. So where several persons, not in partnership, concur in employing an attorney in any undertaking, as to obtain or oppose a bill in parliament, it is advisable for the attorney to obtain such a retainer as shall make his remedy clear against all the employers jointly, or each separately; and providing also that in case any one or more of his employers should not pay his quota, then the others shall separately pay his proportion of the deficiency. And if an attorney be himself a subscriber he should obtain an express engagement to prevent the necessity for resorting to a Court of Equity, as in 1 Bar. & Cres. 74; 1 Chitty on Pleading, 46.

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RETAINER.

inferior practitioners do not require any written retainer is the very reason why the law ought to *enforce* the actual signature of a formal retainer and production of it at some public office, viz. that if the clients were required to sign the same they would frequently pause and refuse to sign, or at least much limit the authority, for fear of being involved hastily in expensive litigation, whereby the authority of such practitioners would be to them inconveniently controlled. (*h*) It has however been recently decided that the circumstance of a plaintiff in an action not having authorized the same is no answer to a motion for judgment as in case of a nonsuit, but that the plaintiff's remedy is against the attorney who erroneously assumed authority, though the Court under circumstances enlarged the rule, to give the plaintiff time to find the attorney, and at the same time granted a rule to shew cause why such attorney should not pay the defendant's costs instead of himself. (*i*) A general retainer to *sue* does not authorize an attorney to oppose the defendant's discharge under an insolvent act. (*k*) The authority to sue must be disputed in the first instance. (*l*)

In the Ecclesiastical Courts the appointment of a proctor must be under seal and duly attested, an excellent precautionary measure. But in the superior Courts of Law no precise words are essential in a retainer to sue; though if the client resolve to *qualify the authority* then he must take care that proper words for that purpose be introduced; as limiting the retainer to writing a letter, or to writing a letter and merely issuing a writ, or conditioned that he shall have notice and be consulted as to further proceedings, especially before notice of trial shall be given, and if so desired restraining any summons or motion for irregularity unless essential to the result of the cause on the merits. The usual authority is in the form in the note. (*m*) In taxing costs formerly a fee was allowed for the

(*h*) See Lord Tenterden's observations in *Owen v. Ord*, 3 Car. & P. 319, and *Anderson v. Watson*, *id.* 214; *Dupon v. Keeley*, 4 Car. & P. 102; *Gill v. Lougher*, 1 Tyr. Rep. 121.

(*i*) *Mundry v. Newman*, 1 Cr. M. & R. 402, and see other cases, Harrison's Index, tit. Attorney, V.

(*k*) *Drake v. Jacain*, 4 Tyr. 730.

(*l*) *Hammond v. Thorpe*, 4 Tyr. 838.

Form of general retainer of an attorney to sue.

(*m*) I, A. B., of No. —, in — Street, in the parish of —, in the county of —, linendraper, do hereby retain Mr. E. F., of —, as my attorney to [commence and prosecute an action in the Court of —, at Westminster, against C. D. now residing at No. — in — Street, in the parish of —, in the county of —, hatter, and G. H. of, &c., and I. K. of, &c., or one or more of them, as may be advisable, for the recovery of the sum of £— and interest thereon, which I claim to be due from them to me, as appears by the annexed particulars of instructions to sue.] Dated this — day of —, A. D. 1835.

Witness to the signature of the }
said A. B. in my presence, }
Y. Z. of, &c.

Signature, A. B.

retainer of an attorney to sue, but since the stamp duty on the warrant has been repealed, no retainer fee is allowed. It would be well, however, to require a written retainer to be filed before issuing any writ, and to allow for the same a moderate fee, which would ensure compliance with the recommended practice in all cases of having *written* retainers.

It has been observed, that as the first general rule of Hil. T. 2 W. 4, orders that warrants of attorney to prosecute or defend shall *not be entered on distinct rolls*, but on the top of the Issue Rolls, and the fourth general rule of Hil. T. 4 W. 4, orders that *no entry shall be made on record* of any warrants of attorney to sue or defend, and the want of any warrant of attorney is aided by verdict by statutes 32 Hen. 8, c. 30, s. 1, and 18 Eliz. c. 14, s. 1, that in the King's Bench and Exchequer no difficulty can arise in respect of the want of any such warrants, yet that in the Common Pleas the officers of that Court are still entitled to insist upon the warrants being *filed* at the warrant of attorney office, and that if not delivered they might refuse to take the next step in the cause, and the master will still allow the costs of *filing* the warrants. (l)

In the case of an *infant* plaintiff, his action may be commenced and prosecuted in his name until immediately before declaration without any retainer or appointment of an attorney; but before declaration a prochein ami or guardian must be appointed to take care of the further conduct of the action. (m) The second general rule of Hil. T. 2 W. 4. orders that no special admission of prochein ami or guardian to prosecute or defend for an infant shall be deemed an authority to prosecute or defend in any but the particular action or actions specified.

2. With respect to *Instructions to sue*, much more attention and care to obtain full and accurate information, not only regarding the right and the probable defence as the evidence, should be observed in the first instance than is usual, especially when the cause of action or defence has arisen at a distance in the country, when it might occasion prejudicial delay at a subsequent stage to have to wait for information that should have been communicated before the commencement of proceedings, and not unfrequently to begin *de novo*; for it will be found that if the principal attorney in the country and his agent in London be very fully informed at the earliest stage of all the facts applicable to

Secondly, How to obtain proper instructions to sue or defend.

(l) 9 Legal Observer, 22, 23.

1 Dowl. & Ry. 13; Bird v. Pegg, 5 Bar.

(m) 2 Inst. 261; Claridge v. Crawford, & Ald. 418.

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the case, whether of the intended plaintiff or defendant, much subsequent trouble and many errors will be avoided, and much time saved, which is frequently lost by the necessity for the London agent writing to the country attorney for *further information* at each successive stage, all which might with very little trouble at the *first interview* with the client, and certainly no increase of expense, have been obtained and forwarded in the first instance. Nor is this a mere theoretical suggestion of convenience, for it has been recently decided by very high authority, that it is *the professional duty of an attorney to adopt this line of conduct*, and it is moreover his duty to ascertain that the *evidence will support the plaintiff's case before he commences an action*; (u) and where an attorney commenced an action in the name of *an executor* without having first ascertained the *evidence* even to prove the defendant's handwriting to a promissory note, the Court made the plaintiff pay the costs as in case of a nonsuit, although in general an executor, when plaintiff, is not to be subjected to costs. (n) It will moreover frequently occur that if a *minute inquiry* into the facts and evidence be made in the first instance, before the defendant has even heard of any intended litigation, the truth will be better elicited than if the investigation were delayed until after the defendant had cautioned neighbours and witnesses from making any communications that might be adverse to his interests. And in a recent case, where an attorney brought on to trial an action for verbal slander, without first ascertaining from the *witnesses* the exact slanderous words as uttered, and was obliged, on account of a variance in those words, to withdraw the record, it was considered that such negligence precluded him from suing for his professional charges. (o)

Instructions to
sue.

As certain rules of Court and the statute for uniformity of process, 2 W. 4, c. 39, sometimes require the *addition of residence and degree* or occupation of the plaintiff and defendant

(n) *Wilkinson v. Edwards*, 1 Bing. N. C. 301; 3 Howl. 137, S. C. *Griffith v. Pointer*, 2 Nev. & Man. 675; *Pickup v. Wharton*, 4 Tyr. 224. In *Southgate, executor, v. Crawley*, 31 January, 1855, the Court of Common Pleas, *dissentiente* Vaughan, J., decided that a plaintiff executor must pay costs, he having prosecuted to trial an action for the whole of a *prima facie* claim of 900*l.* for the hire of horses and carts supplied by the testator, after the defendant had assured the plaintiff that the real claim was only 553*l.* and had paid that sum into Court; the majority of the Court, considering that it

was incumbent on the plaintiff's attorney, after receiving such information, to make further inquiries into the facts and evidence and not to proceed unless the same would certainly entitle the plaintiff to a verdict.

(o) Although according to the Scotch law intercourse with witnesses is forbidden to a greater extent than in England, yet unquestionably the legal and prudent course is to request the intended witnesses, before the commencement of an action of slander, to write down the whole of the slanderous conversation in the very words.

as well as the intended *form of action* to be inserted or indorsed even in serviceable process, or in an affidavit of debt, or in an affidavit subsequently to be made in the cause, and also when process is issued for a *debt*, that the amount of the debt be indorsed thereon; it is always advisable for an attorney, in the first instance, immediately upon being retained, to obtain very full instructions to sue, and for which a fee of 6s. 8d. (or 3s. 4d. when the debt does not exceed 20l.) is allowed on taxing costs, and which charge usually constitutes one of the earliest items in a bill of costs; (p) but that fee is frequently very inadequate, and should be at least tripled, if the full instructions be obtained as presently suggested. To avoid loss of time that might be occasioned in afterwards making enquiry into facts, it is advisable in the first interview with the client to make very full inquiries into all circumstances connected with the case, and to require such client to answer the same, and to take a minute of the result. The subscribed form may assist as an outline of the proper inquiries, and it may be expedient in the first instance to transmit a copy of the questions and answers, with the directions to issue a writ, to the London agent, because such agent, from time to time referring to them, will be enabled immediately to decide upon the *form of action* to be stated in the writ as well as the amount of the *debt to be indorsed*, when at present, for want of such instructions, it frequently happens that he is obliged to write back into the country for fuller instructions, or to avoid delay, is compelled to guess the form of action to be inserted in the writ, and afterwards, when the full instructions for declaration arrive, it very frequently becomes necessary to abandon such process and incur the expense and delay of a fresh writ. (q)

All such preliminary inquiries and answers are calculated to anticipate and avoid the frequent errors and even nonsuits that arise from the want of earlier examination into the circumstances of each case. These instructions being the basis of the action require much more care than is usually evinced in obtaining them. It is even further recommended that in general, and especially if the client be not a man of business or of known accuracy, *one or more of the principal witnesses*, who will afterwards prove the case on the trial, be examined by an

(p) *Morrison v. Simmons*, 1 Bar. & Adol. 559.

(q) It is even submitted that it would be well to have in every country attorney's office printed forms of questions to the effect suggested in the form post, 120, shewing the questions in one column with blanks

left in the opposite column for the client deliberately to write his answers, and to assist the client in so doing, the answers given in the form post, 120, might be shewn to him as a specimen of the manner in which he is in his particular case to write his answers.

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TO SUE, &c.

experienced attorney, and not merely by an inexperienced clerk; (*r*) for it frequently occurs that very small circumstances vary the form of action, and that a mere cursory inquiry would mislead. Thus suppose a client should inform an attorney that a neighbour has broken his fence, filled up his ditch, and traversed his field with waggons; if the client were himself in possession, then the form of the writ and subsequent declaration should be "in an action of *trespass*," but if on further inquiry it should appear that the close at the time of the injury was in possession of the client's tenant under a lease or from year to year, then the form should be, "in an action *on the case*," viz., for the injury to the client's *reversionary* interest, by destroying the hedge and ditch, and not a *trespass* or *direct* and *immediate* injury to his *own* possession. The instructions should also be so full as at all events to enable the agent in town to fill up in the *writ* the *names*, *additions* and *residences* of the plaintiff and defendant, and all other requisites, and also serve as instructions for the declaration, replication, &c.

Accuracy in the preliminary instructions is so important, that it may be expedient, as a general rule, in all cases to state in print or writing *all the general questions* that usually arise, and to introduce in *writing* all other *particular questions* that may be applicable to each case. The questions should be stated in one column, and the client should then be required to write his answers to each in another opposite column, or if too voluminous to be conveniently there introduced, then on a different paper, but in the same order as the questions; and afterwards the principal attorney himself, or a very experienced and intelligent clerk, should go over the whole and examine the client, and even the principal witnesses, upon each answer, so as to secure accuracy; and the form might be to the subscribed effect. (*s*)

(*r*) According to *Atkinson v. Edwards*, of an attorney to ascertain the *evidence* in 1 Bing. N. C. 301, it seems the *duty* the first instance, and see *ante*, 118, n. (*u*).

(*s*) FORM OF INSTRUCTIONS TO SUE.

Form of instructions to sue.	Instructions and Questions to the Client.	His Answers.
	1. What are the full Christian or first name, and surname of the proposed plaintiff?	1. John Thomas Atkyns.
	2. His exact present residence, viz. hamlet, street, number of his house, parish, and county?	2. No number, but about the middle on west side of High-street, Maidstone, county Kent.
	3. His addition or degree, viz. rank, trade, occupation or profession?	3. Linendraper, haberdasher and stationer.
	4. His age?	4. Age 31 on — day of — last.

The *defendant's attorney* should in like manner, at the earliest interview with his client, and even before the commencement of

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INSTRUCTIONS
TO SUE, &c.

A *defendant's*
instructions to
his attorney for
his defence.

Instructions and Questions to the Client.

His Answers.

5. In what character or right is he to sue?*

5. In his own right, (or "as executor of L. M.")

6. Had he any partner, joint-tenant, tenant in common, parcener, co-executor, or co-assignee, as respects the present claim, and who? If yes, state as above the particulars of names, addition and age as to such other persons? If there was a partner, &c. who is dead, state his name and when he died?

6. As surviving partner of James Atkyns, who died on 3d July, 1831, as to £37, and also in his own right as to subsequent items, amounting to £49.

7. Full Christian and surname of proposed defendant, or if the full name cannot be ascertained, state what diligent inquiries of relatives, friends and servants to ascertain the name have been made; and if action be on a *written* instrument signed by defendant, deliver to your attorney an exact copy and a facsimile of signature and attestation.

7. Defendant signs his name J. Morris; I have myself and my journeyman also has made numerous inquiries for the full name without effect, and Morris told the latter that he would not let him know, and I might blunder on as I pleased.

8. The place and county of the residence or supposed residence of the proposed defendant, or if several of them, also the exact addition of rank, trade, occupation or profession, or other best description of each, and on what day* and hours, and at what place in what county he is or they are most likely to be met with to arrest or serve with process?

8. Resides at a corner house in Market-place, Tenterden, county Kent, and is a shoemaker; he is usually at home from one to two o'clock in the afternoon at office, and all the day on Tuesdays, which is market-day there.

9. State the age of proposed defendant or defendants, or at least whether of age?

9. Of full age on the — day of —, A.D. —.

10. State in what character is the proposed defendant to be sued, that is, whether on his own liability, or as executor, assignee, heir, &c. of another, and of whom?*

10. On his own liability as purchaser of goods.

11. State fully the ground of complaint or cause of action. If a *debt*, produce, and to avoid loss of original, immediately have copies made and delivered to your attorney of every account, (comparing each item with dates in the margin,) bills of exchange, promissory notes, contract, lease, &c., and state the balance due to you; and the amount of the stamp on each instrument?

11. Debt.—Balance £43, due on a current account for linen drapery and other goods, as appears from the bill or account annexed, partly due to plaintiff as surviving partner, and the rest in plaintiff's own right; and also on defendant's acceptance for £30, a copy whereof is annexed. The stamp is a *3s. 6d.* bill stamp.

12. If the cause of action be a *trespass* or other injury, state the particulars. If to land, were you alone the owner, or who else? and in what character, whether as joint-tenant, tenant in common, or parcener? Were you alone in possession, or was the land injured in the posses-

12. The answer to this question may be as in the instructions, p. 123, in note. It is necessary in declaration to state name or abuttal, &c. of land injured. See rule H. T. 1834.

* Although it has been held in *K. B.* and *Exchequer* that on *general* process the plaintiff may *declare* in *auter droit*, 1 Barn. & Adol. 19, yet as the practice is at least doubtful in the Court of Com-

mon Pleas, see *post*, *process*, it may be advisable to insert the particular character in the affidavit to hold to bail, writ and declaration.

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an action, make all possible inquiries that may assist either in settling or staying the action at the least expense, or in defend-

Instructions and Questions to the Client.

sion of your tenant, and of what Christian or surname? Give a rough sketch of the places where the injuries were committed, the name of the field and the surrounding fields, highways and lanes, and shew the northern and southern parts of the former by writing close to the same, north, south, &c., and otherwise shewing the abutments of your close.

13. What is the expected defence or excuse for nonpayment of the debt, or for committing the injury? Is there any and what pretence for such defence or excuse? If it be a set-off, have you so carefully examined the accounts on both sides as to be able deliberately to swear to any and what balance at least being due to you? and to what extent will any witnesses, naming them fully by Christian and surname, prove the same, and state the extent of the evidence of each.
14. Do you wish to have defendant arrested, or only served with process? If to arrest him why? have you any and what reason to suspect that defendant will abscond before payment? If defendant be arrested he will then probably defend the action vexatiously; and if you should not recover so much as the debt sworn to, you may be indicted for perjury, and sued for a malicious arrest, or the Court may deprive you of costs. On the other hand, if you do not arrest him, if defendant should leave the country before you obtain payment, you can have no effectual process against defendant's person.
15. In what county would you wish to try the action, on account of the residence of witnesses or otherwise, and why? If the action be for an injury to land or fixed property, the trial must, unless under special circumstances, be where it lies.
16. Do you wish to have the opinion of counsel on your case, or the probable defence, and would you prefer any particular counsel, and whom?
17. In which of the three superior Courts at Westminster do you wish to proceed, either with reference to the Chief Justice usually presiding in each, or in order to retain a particular counsel practising principally in one Court?
18. Do you wish to secure any particular counsel to conduct your action on or before the trial, by retaining him, and whom?
19. State the Christian and surname, residence, station in life, age and connection, if any, with yourself, of all your witnesses, and if your claim is for parcels of goods ordered, sold or delivered at different times, state on the left side of each item the names of such clerks and servants or porters, who can prove the defendant's verbal or written orders, the identity, value, packing and direction of each parcel, and the delivery at the proper carrier's office, and who will prove defendant's hand-

His Answers.

13. Defence as to a part infancy, and the residue, overcharges and payments. Plaintiff's answer is, defendant's letter promising payment after he was of age, (a copy of which letter is annexed,) and that the charges are fair; and plaintiff disputes defendant's pretended payments.
14. I can safely swear to a debt of £35, viz. £30 on bill, and the rest for goods sold, and resolve to have defendant arrested.
15. Action to be tried in Kent.
16. Not necessary, unless you find any difficulty as to the terms of defendant's letter promising to pay, or other ground.
17. I leave the Court to yourself.
18. I leave the retainer of counsel to yourself.
19. I have complied with your request; and annexed is a paper stating the full particulars of the evidence on which I am certain I may rely.

ing it with success, ascertaining as well all the facts as the evidence in proof of them, and how each particular witness can be relied upon. In cases, when proper, he should suggest when and how a judicious *apology*,^(t) or a *tender*,^(u) or *request*,^(x) may be made, or state to the defendant his right not to be taken to prison until twenty-four hours after arrest; and within what time after having been served with a writ, or arrested, the defendant may pay the debt and costs indorsed, so as to

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INSTRUCTIONS
TO SUE, &c.

Instructions and Questions to the Client.

writing to letters, bills of exchange, &c. If any doubt should arise as to the proofs being sufficient to sustain the claim to the amount proposed to be sworn to, then it will be hazardous to arrest, or you should swear to a smaller debt accordingly.

20. State fully any matter occurring to you to be material either as respects your claim, or the defence, or the witnesses, or evidence.

His Answers.

20. I have made a concise statement on the annexed paper.

The following form of instructions in an action of trespass may also perhaps further illustrate.

INSTRUCTIONS TO SUE.

In the Court of —.

Between { A. B.
and
C. D.

Form of instructions to sue in an action of trespass for injury to land.

The plaintiff is a farmer and freeholder, and resides at —, in the parish of —, county of —, occupying his own freehold farm there, and no other person is or has been interested therein.

The defendant is also a farmer, occupying as tenant a farm, one close of which adjoins that of plaintiff.

The cause of action is, that defendant on the — day of —, A.D. —, with several labourers threw down a bank and quickset hedge at the top, and filled up a ditch respectively about thirty rods in length, and the ditch about four feet deep and six broad, and belonging to plaintiff's close or field, part of his said farm; and on the same day and several successive days defendant's servants entered with waggons and crossed plaintiff's said close, and proceeded to a gate adjoining an highway on the south, and forced open the same, and thence proceeded along such highway, and thereby several of the plaintiff's cattle escaped from his said close into said highway, and plaintiff had great difficulty in retaking and driving them back. The defendant has no pretence for claiming a way there. The plaintiff's close is called "Highlands," and abuts towards the north on a close in defendant's occupation, towards the south on the said highway, and towards the east and west on other closes in possession of the plaintiff; and below is a rough sketch of the several closes and highway, and of the part of the hedge, fence and ditch destroyed by the defendant, and the dotted lines describe the track in which the defendant's waggons traversed.

The expenses to make good the fence and ditch, and other expenses and damages amount to about £4:17s.

John Atkins, of —, farmer, and Thomas Fellows, of —, labourer, working on the farm of said John Atkins, know all the local situations and abutments, and can prove the trespasses and are disposed to speak the truth, (or, "but are adverse to the plaintiff, he having warned said John Atkins off his land, and prosecuted said Thomas Fellows for poaching.")

The above statement is correct,

Signed A. B.

John Atkins,
Thomas Fellows, his mark. +

(t) *Ante*, vol. ii. 506 to 510.

(u) *Ante*, vol. ii. 506, 507, *Finch v.*

Brooke, 1 Bing. N. C. 257, 258.

(x) *Ante*, vol. ii. 497, 498.

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INSTRUCTIONS
TO SUR., &c.

avoid further expense, (y) or may deposit the sum for which he may be arrested, with £10 to the sheriff in lieu of giving a bail bond, (z) or may be ready with two persons who have sufficient property within the county to become bail; or at least persons of such known property as probably not to be objected to by any officer. (a) These and numerous other questions, calculated to elicit necessary or useful information essential for the due conduct of any defence, may be stated in writing in the same form as instructions to sue, and to the effect suggested in the subscribed form. (b)

(y) Rule Mich. T. 3 W. 4, referring to rule Hil. T. 2 W. 4.

(z) 43 G. 3, c. 46.

(a) 23 Hen. 6, c. 9.

(b) Suggested questions to obtain instructions for defence.

Suggested questions in order to obtain proper instructions for a defence.

1st. Do you expect to be arrested for any and what sum of money, or only to be served with process, and for what cause?

2. Do you admit any part of the plaintiff's claim? Are you prepared immediately to TENDER that sum, and if so, immediately make a tender as directed, *ante*, vol. ii. 506 to 510, and actually produce and shew the exact amount, *Finch v. Brook*, 1 Bing. N. C. 257, 258, or afford me the means and instructions for so doing?

3. Do you dispute the claim, and if so, are you ready with the amount that will be sworn to, in cash or bank notes, and with £10, so as to keep the same at all times about your person whenever you may happen to be arrested, ready to be instantly deposited with the sheriff, or other authorized officer, in lieu of a bail bond? or are you ready to name two persons as your bail to the sheriff, who have sufficient property within the county where you expect to be arrested, and who will be known to the under-sheriff or officer as sufficient, so as not to be objected to, or occasion delay? If you prefer giving a bail-bond, then immediately obtain the consent in writing of such two persons to become bail, and engage to be at home ready to execute a bail-bond immediately on your arrest, so that you may on your arrest satisfy the officer of your being ready to execute a sufficient bail-bond; or which will be preferable, authorize me to inform the officer in your neighbourhood, who will probably arrest you, that I will engage to deliver to him a sufficient bail-bond, and a proper fee, if he will forbear to put you to inconvenience by actual arrest. If the defendant's attorney have confidence in his client, and is not, as frequently the case, prohibited by his articles of copartnership with another attorney not to give undertakings, he will

in general oblige such client by offering to wait on the plaintiff's attorney, and give his own undertaking to perfect bail above, which avoids much annoyance and extra expense. Although in strictness the officer has only a right to receive a fee of 4*l.* for the arrest, under 23 Hen. 6, it is usual to pay him one guinea, and a smaller sum, as five shillings, for his assistant, and even more to the principal officer for every second hundred pounds, and it is advisable to pay that sum, sanctioned by usage, or the defendant may experience incivility, if not personal inconvenience, and annoyance and distress may be occasioned to himself and family.

4. State the proper Christian and surname and addition of abode of the plaintiff and defendant, and ages of both, so as to enable defendant's attorney to take advantage of any defect in the affidavit or writ, &c. and prepare in some respects for further proceedings in the cause.

5. State all the particulars of the supposed claim of the plaintiff, by what witnesses you expect he will attempt to prove the same, and the relationship, interest, and character of each witness accurately.

6. Supposing it should be necessary to put in bail to the action, and who must swear to their property, state their names and addition, and particulars of their property, and whether they have ever before been rejected as bail, and whether they have consented to become bail for you, and if not, then immediately apply to them and obtain their consents in writing to become such bail, and deliver to me such consents. And be certain that after having become bail, they will not at any time suddenly take alarm, and imprison and render you. And also well consider whether or not either of such persons could on the trial give material evidence in support of your defence, for if they could, then it would become necessary to change such bail, and obtain others in lieu; and to avoid that trouble and expense the defendant had better procure other bail in the first instance.

7. State all the circumstances, if any, in respect of which you think and can

3. A skilful attorney having, on behalf of an intended *plaintiff*, obtained answers to all appropriate questions, and which answers will constitute his *general instructions* to sue, will thereupon, before he has any communication with the proposed defendant, and certainly before he prepares any affidavit of debt, or issues any process, *well consider* the *right* of the plaintiff, and the *probable defence*; and in all those cases in which a *demand*, *offer of performance* of a condition precedent, *notice of action*, or *any other preliminary* step may by law be required, will carefully ascertain whether every requisite proceeding has already been duly had, and if not, he will immediately take them, and *secure evidence* of their completion. These have been fully considered in a prior chapter, (c) but some of them appear here to require more particular notice.

4. The principal difficulties that occasionally arise are *by* and *against* what *party* or *parties* an action *must* or *may* be *sustained*, and in cases where the parties interested have the *election* or *choice*, then by what *circumstances* the choice should be influenced. Those considerations involve a comprehensive and complete knowledge of law and equity, and of the differences between legal and equitable *rights*, *injuries*, and

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Thirdly, Of the plaintiff's attorney's consideration of various points after such instructions, and before the commencement of an action.

Fourthly, Who to be the plaintiff or plaintiffs, or the defendant or defendants. (d)

swear that you have either a good defence to the plaintiff's claim in whole or part, either on the *merits* or justice of the case, or on any and what *legal* or *technical* objections. If either, then state names and residence of all the witnesses on whose testimony you rely to prove such your grounds of defence, so that I may at my earliest convenience examine such persons respecting their expected testimony; state the character of each witness, and whether they are adverse or favourable to your wishes, and the particular facts that will be sworn to by each; and appoint them to come to my office on the — day of —, at the hour of —, or to be at home at their own residences on &c.

8. Supposing your defence to be doubtful, are you prepared to offer any and what compromise or part payment, either to be made immediately, or when; and whether to be accompanied by any third persons, and whose guarantee or undertaking, or any and what other security; and what terms, if any, that you have accurately ascertained, you can for a certainty fulfil? And do you authorize me to offer, with or without prejudice, any and what proposal?

9. If you have reason to apprehend that your affairs are in so deranged a state as to render it probable, or even possible, that you will be obliged to become a bankrupt, or obtain your discharge from the plaintiff's claims under an insolvent act, then it is my duty to apprise you that your pleading a dilatory plea, or putting the plaintiff to any useless expense in defending the action, may endanger your discharge, or at least lengthen your imprisonment under express enactments, and also may so irritate the plaintiff that he will shew no indulgence, and stimulate others against you.

Lastly, You will please to add any communication that you may consider important or useful in the conduct of your defence.

(c) *Ante*, part iii. chap. 2, page 46 to 73.

(d) See leading cases as to the joinder of parties in equity, *Harvey v. Cooke*, 4 Russ. 34, 54; *The King of Spain v. Machado*, 4 Russ. 224 to 236—240 to 241; *Makepeace v. Haythorne*, *id.* 244, 562; *Lloyd v. Learing*, 6 Ves. 773; *Chit. Eq. Dig.* 217, 898; *Collyer v. Dudley*, 1 Turner & Russ. 422.

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remedies, and certainly constitute branches of law more particularly within the department of a *barrister* who has been a *special pleader*, or of a very experienced pleader; and distinct treatises have been written on that particular branch, but which by the recent alterations now require some alteration.^(e) But it is essential that *every practitioner*, whether barrister, pleader, or attorney, should have a general and practical knowledge of this branch of the law, and of the alterations introduced by 3 & 4 W. 4, c. 42.

The general rule is, that *at law* an action must be brought in the name of the party or parties in whom the *legal* right was vested at the time of the injury against the party or parties who committed the injury, and not by a person who has an *equitable* interest, unless he also be in possession, and the injury has affected that possession. As regards *defendants* in actions on *contracts*, the rule was, that unless all parties liable were joined, the parties sued might plead *in abatement* the *nonjoinder*, even if the omitted party were abroad, and compel the plaintiff to proceed *de novo*, and by special original, until he had outlawed the absent contractor; ^(f) but this is now remedied by 3 & 4 W. 4, c. 42, s. 8, which in effect takes away a plea in abatement for *nonjoinder*, when the omitted party is out of the kingdom, by compelling a party pleading that plea to aver therein that the omitted person is resident within the jurisdiction of the Court, and to *swear* in his *affidavit* of its truth that the party is so resident, and shew his place of residence with convenient certainty.^(g) But still if *too many* persons be sued as co-contractors, or if the plaintiff cannot on the trial *prove a joint liability* in all the defendants, it is in general ground of nonsuit;^(h) and therefore in case of doubt it is *the safer course to sue only those persons who clearly were originally co-contractors*.

Another remedial extension of rights of action is, that actions for *torts* respecting real and personal *property* may now, under certain qualifications, be brought by or against *executors*.⁽ⁱ⁾ On the other hand, executors suing in right of their testators are now *personally liable* to pay costs, in case they should fail.

(e) See observations, *ante*, vol. ii. 47 to 52; Chitty on Pleading, 5th edit. vol. i. 1 to 107, as to the *parties* to an action; and see *post* as to parties in equity.

(f) But now by 11 G. 4 and 1 W. 4, c. 68, s. 5, an action may be supported against any one of several mail contractors, stagecoach proprietors, and common carriers by land, and no action for loss

or injury to any parcel, package, or person, is to abate for want of joining any co-proprietor or co-partner for hire.

(g) 3 & 4 W. 4, c. 42, s. 8.

(h) But see the exception under the statute of limitations in 9 G. 4, c. 14, s. 1.

(i) 3 & 4 W. 4, c. 42, s. 2, 3.

and the Court or a judge should so direct; (*l*) but if an executor or administrator proceed with care in making all proper inquiries before he commences his action, it is not usual to punish him with costs. (*m*)

In actions in form *ex delicto*, as case, trover, trespass, replevin, or ejectment, there can be no plea in abatement of the nonjoinder of a party liable to be sued, nor on the other hand is it any ground of nonsuit that all the parties sued are not liable; (*n*) and hence it was sometimes the practice in those actions to include a party as a co-defendant, merely or principally in order to prevent him from giving evidence for the other defendants; but now by the 3 & 4 W. 4, c. 42, s. 32, an acquitted defendant, or one with respect to whom a *nolle prosequi* has been entered, is entitled to his costs in *all actions*, unless the judge in case of a trial certify that there was reasonable cause for making such person a defendant in the action, although before that enactment that remedy for an acquitted defendant, sued with others, was confined to actions of trespass. So that now, as regards the parties to an action, it is essential well to ascertain the right to join, as well as the expediency and propriety of joining a person, whether as a plaintiff or a defendant, before the commencement of such action; and in case there should be a mistake in this respect, the Court will not allow a name to be subtracted or added, unless in cases where the statute of limitations might otherwise bar the claim. (*o*) In a recent case, the judge upon the trial refused to permit an amendment in a declaration in ejectment on a joint demise of two persons, who it appeared were *tenants in common*, who cannot properly join in a demise in ejectment; (*p*) and the joining a defendant, against whom no evidence can be adduced, might prejudice a jury, and upon the plaintiff's closing his case, the judge may direct an immediate acquittal of such defendant, so as to render him competent to give evidence for the other defendants. (*q*)

Should it appear essential or expedient that the name of a partner or trustee, or husband, or co-assignee, or co-executor, or assignee of an insolvent partner, should be named as a sole plaintiff, or as one of several plaintiffs in a personal action, or in ejectment as a lessor of the plaintiff, then it is always advi-

Of obtaining a person's authority to use his name as a plaintiff or lessor of plaintiff upon an indemnity, &c.

(*l*) 3 & 4 W 4, c. 42, s. 31.

(*m*) *Wilkinson v. Edwards*, 1 Bing. N. C. 301; 3 Dowl. 137, S. C. *ante*, 118.

(*n*) *Govett v. Radnidge*, 3 East, 62.

(*o*) See *post*, Chap. V. as to process

and amendment thereof.

(*p*) *Doe v. Errington*, 3 Nev. & Man. 646.

(*q*) *Child v. Chamberlain*, 6 Car. & P. 215.

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sable in the first instance to endeavour to obtain his *express written consent* that his name may be used, and to *offer such indemnity* against liability to costs as he might reasonably require; and if he should refuse, then the *draft* of a sufficient bond, with two or more competent sureties, and conditioned to indemnify him against all damages and costs, should be tendered and left with him for his approbation, or some other adequate indemnity should be offered and accompanied with a proposition, in case the sufficiency of the sureties should be disputed, to refer that question to some competent person. (q)

Form of and
condition of a
bond to indem-
nify against
costs.

(q) See *ante*, vol. i. 505, and *Spicer v. Todd*, 2 Tyrw. Rep. 172, and cases there collected. In general, the tender of the *draft* of an indemnity bond, on unstamped paper, for *approbation*, in the first instance, suffices, *ante*, vol. i. 505. The obligatory part of the bond should be in an adequate penal sum to cover the utmost possible amount of costs, from the commencement of the suit to the determination of a writ of error in the House of Lords, and be from the parties beneficially interested, and two or more sufficient sureties jointly and severally. The condition may be as follows: "Whereas the above bounden A. B. claims to be entitled to recover from C. D. of, &c. the sum of 500*l.* and upwards, and hath been advised that it is essential in any proceeding for the recovery thereof to use the name of the above named Y. Z. as a plaintiff, either jointly or separately with some other person, and the said A. B. hath requested the said Y. Z. to permit and suffer his name to be used in an action or other proceedings against the said C. D., for the recovery of the said claim, and hath proposed to indemnify him from all consequences, and the above A. B., E. F., and G. H., have consented to execute and deliver the above writing obligatory to the said Y. Z. for that purpose: Now therefore the condition of the above written obligation is such that if the said A. B., E. F. and G. H., or one of them, or the heirs, executors, or administrators of either of them, do and shall from time to time and at all times hereafter indemnify and save harmless the said Y. Z., and his heirs, executors and administrators, his estate, goods and chattels, from and against all damages, costs, expenses and charges, that he or his heirs, executors, administrators or assigns, shall or may incur, or become liable to bear, pay or sustain, for or by reason or on account of his the said Y. Z.'s name being or having been used in any action or proceedings whatsoever against the said C. D., or his executors, administrators or assigns, for the recovery of the said claim, and also, if the said A. B., E. F. and G. H., or one of them, do and shall pay to the said Y. Z. lawful interest for and upon any sum or sums of money that he the said Y. Z., or his executors or administrators may be obliged to pay by reason of the premises, then this obligation is to be void and of no effect; but otherwise to stand and remain in full force.

A. B. (L. S.)
E. F. (L. S.)
G. H. (L. S.)

Sir,

Form of letter
to accompany
the draft of the
bond, and to be
delivered to
Y. Z.

Please to take notice, that in consideration of your permitting your name to be used in an action or other proceedings against C. D. for the recovery of 500*l.* upwards, which the said A. B. is beneficially entitled to receive, and which he is advised must be sued for in your name: we the said A. B., E. F. and G. H., are ready and willing to execute a bond conditioned as in the accompanying draft, or such other bond or security as you may reasonably require as an indemnity against any liability you might thereby incur. And for references respecting our competency to become security to you for the purpose aforesaid, we refer you to &c. (here state referees and their residence,) and we request you to approve or make reasonable alterations in the said draft as you may think fit or be advised to introduce, and to return the same to Mr. ———, of, &c., as attorney for the said A. B., or to send to him the draft of such other security as you may reasonably require, on or before the ——— day of ——— instant, and to fix a time and place for our executing the proper security in the presence of yourself or your solicitor. Dated on

To Mr. Y. Z.

A. B.
E. F.
G. H.

If this be not done before the suit has been commenced, or at least before any application to the Court has been made to stay the proceedings, the party beneficially interested may incur the costs of a motion by the person whose name has been used without previous leave, or may incur the risk of a release being pleaded at the trial, which, although it may perhaps be afterwards got rid of upon motion, may yet occasion increased expense and delay. (r)

It seems to have been considered, that if a *wife* live separate from her husband, or carry on a separate trade with his consent, he impliedly engages to permit his name to be used in all proper proceedings. (s) But according to a subsequent case, the Courts will not suffer the action to proceed until the husband has been sufficiently indemnified according to the judgment of the master; (t) and therefore the safest course is *first* to tender an indemnity; and in deeds of separation it is advisable to introduce an express power to use the husband's name on all proper occasions. (u) And where an action was brought by two out of four executors, and those who were not joined in the action released to the defendant, who pleaded the release *puis darrein continuance*, the Court refused to set aside such plea, the plaintiff having failed to establish a case of fraud; and as a general rule a plea of that nature is not to be set aside unless in a case of *gross fraud*. (x) But it is considered that creditors in general have a just right to require assignees or trustees to sue for the recovery of claims due to the estate. (y)

It has also been decided, that a *solvent* partner may, without asking permission to do so, sue out a writ in the name of himself and co-partner, or if the latter has been bankrupt, then in the names of his assignees as well as his own, in order to recover a debt due to the partnership: though the objecting partner might apply to stay proceedings until the partner so suing has given him security against costs, or he might go into equity to prevent him from receiving the proceeds; and therefore a motion to set aside the writ and proceedings in such a case, was dis-

(r) *Spicer v. Todd*, 2 Tyrw. Rep. 172, and cases there cited; and 1 Chitty on Pleading, 5 ed. 696, note (c).

(s) *Chambers v. Donaldson*, 9 East, 471; 4 Bar. & Ald. 419; 1 Chitty on Pleading, 5 ed. 696, note. In the Ecclesiastical Court, we have seen, a wife may sometimes sue alone, *ante*, vol. ii. p. 467. *Norris v. Hemingway*, 1 Hagg. R. 4; 3 Add. R. 151.

(t) *Morgan and wife v. Thomas*, 2 C. & M. 388.

(u) See 4 Bar. & Ald. 419. •

(v) *Herbert v. Pigott*, 2 Crompt. & M. 384; but see *Smith v. Newman*, 4 Bar. & Ald. 419; 7 Taunt. 421; 1 Chitty's Plead. 5 ed. 696, note (e).

(y) See Law Journal, October, 1835, p. 388; *Ex parte Rylandson v. Elm*, 2 Deacon & Chitty, 392.

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charged with costs. (z) In case of bankruptcy, the 6 G. 4, c. 16, expressly authorises the assignees of a bankrupt partner to use that of the solvent partner, but directs that such solvent partner shall be indemnified, and also have such proportion of the sum recovered as the Chancellor shall think fit. (a)

Sixthly, Of the
form (b) of
action to be
observed.

With respect to the *form of action*, unquestionably it is more especially the duty of a professed *special pleader*, either at the bar or practising under it, to be *particularly well informed* upon that subject. But as it is always important that *every practising attorney* should have and exercise *considerable* knowledge of the subject, so as never entirely to depend on *any* third person, but be able to exert his own care and judgment relating to the pleadings, it is most essential in the *writ* and *declaration* not only to adopt that form of pleading which can in point of law be sustained by the evidence on the trial, but also frequently to exercise a *judicious choice* of one of several forms when a choice is permitted by law, and as many causes will not afford the expense of taking the opinion of counsel or special pleader, it is incumbent on *every attorney* to obtain at least a *general* knowledge of all the usual forms and their applicability, and even when they have been settled by a professed pleader, to examine the same carefully with the facts, and exercise his own judgment on their sufficiency, and if he doubt, to suggest such doubt to the counsel or pleader. These are usually divided into forms *ex contractu* and forms *ex delicto*; the former are assumpsit, debt, covenant, and detinue, which latter may however be sometimes *ex delicto*; and those strictly *ex delicto* are case, trover, replevin, trespass and ejectment. The *choice* of the form of action depends on the *facts*, and whether the ground of complaint or *cause of action* be the non-payment of a *debt* or other breach of *contract*, or for a *tort*; and if the former, then whether the sum became due upon a simple contract or upon a deed or record, for in the former case the form of action might be assumpsit or debt, though in the latter only debt; or in case of a *record*, debt or *scire facias*; and if the claim be for damages in respect of a breach of contract, then the form of action must, if the contract were not under seal, be *assumpsit*, or if under seal, then *covenant*. But where a contract and a public duty concur, as in an action against a carrier, innkeeper, &c. sometimes the plaintiff may treat the non-observance of the duty as the

(z) *Whitehead v. Hughes*, 4 Tyrw. R. 92; 2 C. & M. 318, S. C.

(a) 6 G. 4, c. 16, s. 89.

(b) See these fully considered, 1 Chit. on Pleading, 107 to 243.

cause of action, and declare in *case*. If the action be for *detaining* a deed, &c. then the plaintiff has the election of an action of detinue or trover. If for a mere *trespass* or injury, without any contract express or implied, then the form of remedy must be an action *on the case*, *trover*, *trespass*, *replevin* or *ejectment*, depending on the varying circumstances of each case, and as well on the nature of the thing injured, as on the nature of the *injury* to the same, whether direct or only consequential, and also on the plaintiff's interest therein, and whether he was in *actual possession*, or had only a *future right* of possession. The different forms of action, and their application, in general depend on the *common law*, but sometimes are prescribed by statute, and not always with the propriety that was observed by our ancestors, as exemplified by the enactments in 43 G. 3, c. 141, s. 2, which prescribes that if a *trespass* has been committed under a conviction that has been *quashed*, the *declaration* (and now the writ) shall be in *case* for *maliciously* doing the act complained of.

Formerly (excepting in process to *arrest* the defendant, and in proceedings on a recognizance of bail,) it was not necessary to decide upon the *form of action* until the *declaration was framed*. But since the statute for enforcing the uniformity of process, 2 W. 4, c. 39, requires the form of action to be stated in all process, it is necessary to state the same, though very concisely, even in a *servicable* writ of summons; so that *now* it is incumbent on every practitioner to determine upon the *form of action* before he issues the first writ or process, and the copy of the before-mentioned instructions should be sent from the country to the London agent in the first instance, thereby enabling the latter to decide upon the form of each, and insert it correctly in the writ. The skill of the practitioner is evinced as much, if not more, in the *judicious choice* of the form of remedy, as in the interior structure of the declaration, &c. Thus, as the interpleader act only applies to the enumerated actions of assumpsit, debt, detinue and trover, a plaintiff, by issuing his writ in *covenant* or *trespass*, or *trespass on the case*, may, by a small variation, preclude the defendant from afterwards availing himself of the provisions in that act. (c)

In cases of reasonable doubt, not merely on the *right of action*, but who should be the *proper parties to sue or be sued*,

Seventhly, Of taking counsel's opinion.

(c) *Ante*, vol. ii. 316.

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COUNSEL'S
OPINION.

or upon the *form of action*, or of the *pleadings*, it is certainly incumbent on an attorney to take counsel's opinion upon a *very explicit and accurate statement of the facts*, approved of by the client upon his careful examination, and sometimes not drawn up until the *witnesses* also have been examined, and with proper questions, and the reasonable expense of which will now be allowed in taxing costs, even between party and party, and certainly so between an attorney and his client. (*d*) And such opinion, when positive, will in general, if obtained upon a *carefully well drawn case*, protect the attorney from any action for acting strictly in accordance with that opinion, however erroneous in law it may have been. (*e*) The case should be so distinctly stated, with *separate questions*, as to require specific and distinct answers upon the principal questions arising from the statement of facts, viz. 1st, the general *right of action*; 2ndly, who should be the *parties*, either as plaintiffs or defendants; 3dly, the *form of action and declaration*; 4thly, the *evidence* to sustain the action or defence; and 5thly, whether any and what *further inquiries* into facts be essential? (*f*)

Eighthly, Of retaining counsel.

We have in the preceding pages adverted to the expediency and duty of an attorney for a plaintiff, in cases of difficulty or importance, of *retaining* one or more of the most able counsel before the defendant has the least intimation of the intended proceedings. (*g*) Although there are very many counsel of great ability, yet there are very few of commanding and super-eminent talent as Nisi Prius advocates, and hence the result of a cause may frequently depend on securing one of the latter.

(*d*) *Ante*, vol. ii. 43, note (*c*).

(*e*) *Ante*, vol. ii. 21, 22, 32, 33, and as to what opinion, *id.* 43.

(*f*) After stating the *facts* in natural order of time, and as it is expected they can be proved, the case may conclude somewhat to the following effect. "As the parties interested will entirely be governed by your opinion, and an action, if not successful, would be ruinous, you will be pleased to give decided and explicit answers to the following questions:—

1st, Supposing the above statements can be distinctly proved, are the complaining parties clearly entitled to recover at law?—and if not, why?—and if not, is there any and what remedy in equity or otherwise?

2ndly, Who should be the plaintiffs and who the defendants?

3rdly, What should be the *form of action* expressed in the writ and in the declaration?

4thly, Will the above stated evidence be sufficient to entitle the plaintiff to a verdict at law, and if not, in what respects must the evidence be improved?

5thly, You are requested to suggest any proper inquiries after any and what further evidence that you may deem advisable; and also such precautionary measures, if any, to be adopted, and when, or any other proceeding tending to the advantage or security of the parties interested?

6thly, Whether, upon the whole, the parties interested may proceed in the action recommended by you with confidence of success?

(*g*) *Ante*, vol. ii. 71, 322.

Suggested form of case for counsel's or plender's opinion.

The ordinary retaining fee in a single cause is one guinea. A general retainer, securing the counsel for the client in every case in which he may be a party, either separately or jointly with others, is five guineas. At law a retainer, whether special or general, and either on the part of a plaintiff or a defendant, may be given before any process has issued, and if duly given in the cause continues until its conclusion, and does not always require renewal every year; (*h*) but care must be observed that the names of the parties be properly stated, or it will not preclude the opponent from afterwards giving a correct retainer. If however a retainer be A. B. and others against C. D. and others, it will secure the counsel whatever persons may be afterwards named in the cause, provided the name of the party particularized be one. In equity it seems that a special or particular retainer is of no efficacy unless given *after* bill filed, though it is otherwise as to a *general* retainer. (*i*)

With respect to the obligatory effect of a retainer, it seems incumbent on a solicitor to give a *fresh retainer* the instant the former has according to usage become inoperative, for otherwise the *opponent* may by offering *his* retainer, or even tendering a brief, obtain the assistance of the same counsel against his former client; and there is no distinction in this respect between cases where such counsel may have become *confidentially acquainted* with *secret information* which he *possibly might* afterwards use injuriously against his former client. If it were otherwise, and if, as has been insisted by some, it were incumbent on counsel, before he received a retainer or brief from the opponent, to send to his first client to know whether it was his intention to give a second retainer, he might appear indecorously to seek employment, and also have to submit to the risk of an answer that his assistance was no longer required, a situation in which no counsel ought to be placed; and if one retainer were to operate perpetually there would never be a second. Moreover, it is not to be believed that any counsel worth retaining will be so dishonourably inclined as to make undue use of any information he may have confidentially obtained. Perhaps, however, the more honourable conduct is to decline holding a brief on either side when any previous confidential communication might be deemed prejudicial to the prior client. A case on this subject recently occurred at

(*h*) But a retainer for the *assizes* must be renewed on or before the last day of

the term preceding the following assizes.
(*i*) *Ante*, part iii. 72, new ed. note.

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RETAINING
COUNSEL.

the Rolls Court, and is stated in the note. (i) If a retainer (then called a *stifling* retainer) be given and not followed in due time with the delivery of a brief, we have on record a spirited instance in the celebrated Mr. Dunning, of his afterwards taking a brief on the other side. (j) The form of a retainer is subscribed. (k)

Ninthly, Of the plaintiff's attorney's letter before action.

We have in a prior page shewn that sometimes *an actual demand* of goods or money may be *indispensable*, (l) and have adverted to the expediency (unless it is expected that the defendant will abscond or avoid the service of process) of the plaintiff's attorney addressing a *civil letter to the defendant*, stating his

(i) *Rolls Court, Saturday, February 2d, 1835.*—*In re Baylis, Martin, Grout, and Brown, Partners.* Mr. Bickersteth moved in this case for an order of the Court that the plaintiff, Martin, might be permitted full liberty to inspect the works at a manufactory for the finishing of silk, and particularly Norwich crape, conducted at Ponder's End, by the defendants, with whom he is in partnership. He then stated the circumstances of the case. The learned counsel said that this motion had a *second object* in view, which was of considerable importance. In the suit between the partners, Mr. Kindersley had been counsel for the plaintiff. It so happened, however, that after that gentleman had been promoted to the honour of a silk gown, he had not received a retainer. He was then proffered a retainer by the other side, thereby carrying all the information which he had *confidentially* acquired when acting for the plaintiff. There was a good deal of obscurity and

indecision, the learned counsel remarked, in regard to the practice of counsel in such cases. Lord Eldon had remarked that he considered that counsel should not accept a retainer in opposition to a former client without giving the latter notice, and the option of again retaining him. No decision, however, was come to on the point. It was important that his Honour should, in this case, settle it, and in his order restrain Mr. Kindersley from appearing in the suit in opposition to the plaintiff.

His Honour said that, with regard to the question respecting the retaining of counsel, he could not interfere—he had himself been in a case where a like application had been made to Lord Eldon, in which his lordship declined a decision. The order therefore should be made to secure to him the principal object of the notice of motion, but without costs.

(j) See Palmer's *Prac. House of Lords*, p. 14.

Forms of retainer of counsel.

(k) In the K. B., C. P., or Exch.

Between { William Jones, Plaintiff,
and
Thomas King, Defendant.

Retainer on behalf of the above plaintiff [or defendant], Mr. Serjeant Wilde, One Guinea.

J. and W., Temple,
February 4th, 1835.

In Parliament.

In the matter of an intended petition against the return of ——— Bailey, Esq. for the city of Worcester.

Retainer to Mr. Serjeant M., Five Guineas.

For the petitioners.

B. S. and C., Essex Street,
January 30th, 1835.

In the House of Lords the form of a general retainer runs thus:—

"Mr. Attorney-General [or Mr. —,] is retained for A. B. in all appeals which shall be brought by or against him, or in which he shall be appellant or respondent.

C. D., Agent."

Fee, Five Guineas. [Here add the date.]

And see a form Palmer's *Prac. Lords*, 14, 66.

(l) *Ante*, vol. ii. 56, and see suggested form, *id.* and *post*.

instructions to sue and the utmost previous time he can allow, and that after the expiration of that time he must obey his instructions, and requesting the defendant to name his attorney to whom process may be sent for an undertaking to appear or to put in and perfect bail, and thereby save the defendant any personal annoyance or inconvenience by personal service of the process or arrest. Such letter should allow a reasonable time for the defendant to satisfy the claim if so disposed, or if resolved to resist the claim to consult an attorney or to procure bail. Courtesy in this respect in general avoids acrimony, and disposes a defendant the more to exert himself to discharge the claim, or at least not to interpose vexatious objections to accidental irregularities that possibly may occur. The form of letter may vary according to circumstances, that given in the subscribed note may assist. (*l*)

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LETTER BEFORE
ACTION.

Formerly there was not any written rule of Court respecting any allowance or remuneration for writing letters before action, but the masters and prothonotaries of each Court had rules of their own. In all the Courts, if the plaintiff's attorney could produce a letter in answer to one that had been written applying for the debt, it was conclusive that such a letter had been sent, and 3*s.* 6*d.* (not 5*s.*) was invariably allowed for it. So if the party or attorney opposing the taxation admitted that a letter had been written, then the 3*s.* 6*d.* is allowed. In the Exchequer, where no letter in answer could be produced, and where the party or attorney opposing the bill would not admit that a letter had been sent, still if the attorney who supported the bill stated positively that a letter had been sent, then the masters in that Court would allow it. In the King's Bench and Common Pleas it was different. In those Courts if no letter or answer could be produced, and the party or attorney opposing the bill would not admit that a letter had been sent, the masters and prothonotaries disallowed it, unless

(*l*) Sir,

I am instructed by Messrs. — of —, as their attorney, immediately to commence an action against you for the recovery of their claim of £—, and interest thereon; and as they have repeatedly applied to you for payment without effect, no further delay will be admissible, and unless the said claim, with interest thereon, (which I hereby demand in pursuance of the statute 3 & 4 W. 4, c. 42, without prejudice to the numerous other previous demands of interest,) be paid on or before the — day of —, instant, I must, in pursuance of my instructions, immediately afterwards issue process against you. You will be pleased to inform me by return of post whether you will pay the said debt and interest, with 3*s.* 6*d.* for this letter, before the above appointed time, for if not, further expense will be incurred in preparing the necessary process. As it is not the wish of Messrs. — or myself to put you to avoidable inconvenience, pray inform me the name of your attorney who will undertake to put in and justify bail or enter an appearance to the action we may commence. Dated, &c. G. H. of No. —, — Street, London,

Form of letter
of plaintiff's at-
torney to the
intended de-
fendant.

Attorney for the said Messrs. —;

To Mr. —

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the attorney who supported the bill could make an *affidavit* that it was sent, which he had a right to do, and the *3s. 6d.* for the letter and the costs of the affidavit, if it be required, were then allowed.

Now a fee of *3s. 6d.* is allowed in every case for the letter, if sent before action brought, and when the claim exceeds *20l.* But by an express rule commencing in operation on 15th March, 1834, directions were given to taxing officers, in cases where the sum recovered shall not exceed *20l.* without costs, that the plaintiff's costs shall be taxed according to the reduced scale thereunto annexed, and the first item in that scale allows for a letter before action, *if sent, two shillings*; but provides that if the action be tried before a judge of the superior Courts, or judge of assize, if he certify on the *postea* that the cause was proper to be tried before him, and *not* before a sheriff or judge of an inferior Court, then the costs shall be taxed upon the *usual* scale. (*m*) In a recent case it was established that an attorney is entitled to his costs for writing a letter demanding a debt from a defendant before writ issued, and that he may proceed* in the action, unless the same be paid, even after payment of the debt before a writ was issued. (*n*) Thus where the plaintiff's attorney wrote to the defendant demanding payment of a debt and *5s.* for his letter, and the defendant wrote in answer that he would remit the amount in a fortnight, and the attorney on the 14th April replied that if the debt were paid on the 21st April no further expense would be incurred; but at the same time demanded *13s. 4d.* for his costs. The defendant on the same day, before he received the second letter, remitted the debt to the plaintiff, and on the day following it was received by the latter and a receipt given. And the attorney, on the day the money was received by the plaintiff, sued out a writ in order to secure the payment of his costs. Learning afterwards that the plaintiff had been paid, he informed the defendant that unless the sum of *1l. 1s.* was paid to him he would proceed in the action for costs, at the same time informing him that he would not charge for the writ if the money and costs at first demanded were paid. But as the defendant refused to pay those costs the attorney proceeded with the action, and thereupon the defendant obtained a rule nisi to stay proceedings; and upon cause shewn, the Court said

(*m*) Wordworth's Rules, 153, 154.

(*n*) *Morrison v. Simmers* 1 Bar. & Adolp. 559, and apparently stated in

1 Dowl. Pr. C. 325, omitting counsel's arguments.

"the defendant, by remitting the amount of the debt to the plaintiff instead of his attorney, was guilty of a breach of good faith. If a writ had been issued before payment of the debt, the attorney might have charged for the costs of the writ and 6s. 8d. for instructions. The proceedings can only be stayed on the terms of paying the 13s. 4d. and the costs of the application." (o) This decision appears to establish that an attorney *cannot be prejudiced by his courtesy* in writing and actually sending a letter, and that the trouble of so doing must, if he insist, be paid by the opponent. In short, where there has been *any default at any time* in readiness to pay a debt, the defendant could not support a plea of tender averring as is essential *tout temp prêt*, and consequently cannot get rid of any costs or expenses reasonably incurred, and on that account the Courts sustain the charge for a letter *bona fide* written and sent before the commencement of an action. (p)

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But perhaps the most important consideration, *collateral* to the trial of the *merits*, is whether the plaintiff should proceed to *arrest the defendant*, or prefer mere *serviceable* process. We shall in another chapter consider all the peculiarities and practical consequences of proceeding byailable process, but a few observations in this place as regards the *propriety or expediency* of adopting that proceeding, may not be improper. In general, unless there be strong grounds to fear that the defendant will, for the mere purpose of vexatious delay, resist the action, or will leave England, so as to avoid execution after judgment, there are many *prudential reasons* in favour of serviceable process. Thus, amongst others, is the probability that a defendant, after he has been treated with lenity, will exert himself to pay the plaintiff, and may probably be able to retain his credit so as to satisfy at least a part of the debt, although he might not be able to pay all; and when, if the *harsher proceeding by arrest* had been adopted, he would have been instigated to give a preference to another creditor; or his

Tenthly, Whether or not to arrest the intended defendant.

Reasons for not arresting.

(o) *Ante*, 136, n. (n). It was argued in that case, by the counsel for the defendant, that it was not the practice to allow any charge for the letter antecedent to the action, and the practice certainly was formerly so, and consequently only the most respectable attorneys write such preliminary letter. The author was present on the trial of an action on an attorney's bill before the then Chief Justice of Common Pleas, Sir James Mansfield, and on a reference of several bills of costs

being pressed, the plaintiff, an attorney, refused to refer unless his charge of 3s. 6d. for a letter was previously agreed to be allowed, but which the defendant pertinaciously refused, upon which the Chief Justice facetiously declared that rather than the cause should not be referred he would himself pay the 3s. 6d., and which he instantly did, whereupon the parties, ashamed of their ill-judged pertinacity, immediately referred the cause generally. (p) *Hume v. Peplow*, 8 East's R. 168.

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other creditors, taking alarm from the arrest, and still more from the defendant's inability to find bail, would also press him, and occasion immediate general insolvency, when he might have stood his ground, at least for a time, and paid all, or at least the plaintiff. These are *prudential* considerations that frequently, independently of *moral feeling*, ought to influence in favour of the milder course. Besides, an arrest, unless in cases of *gross fraud*, is frequently a harsh measure, inducing great family distress, sometimes even self-destruction; and the measure too frequently proceeds from an *uncharitable* spirit of disappointment and unwarrantable revenge, by which no well regulated mind, certainly *no gentleman*, and indeed still more *no Christian*, ought to be influenced. Sometimes, also, arrests are made upon too hasty a supposition of the state of accounts; and as an affidavit of debt must be made before any arrest, and the party may, if it turn out to have been untrue, be *indicted for perjury*, or be sued for damages on account of a *malicious arrest*, or at least may *lose the costs* of his action under the provision in the 13 Geo. 3, c. 46, the proceeding by arrest ought never to be adopted without *great consideration and urgent occasion*, and solely as an indispensable measure to prevent the loss of a debt, payment of which it is expected will be enforced by arrest, *but not otherwise*.

Reasons for
arresting.

On the other hand, when a debtor has obtained credit by *wilfully misrepresenting* his circumstances, or misrepresenting the object of his requiring credit, or he has been guilty of *other gross fraud*; or has become debtor in consequence of a *criminal* indulgence of extravagance; or where it is certain that he is *about to abscond*, and evade payment, instead of endeavouring to the best of his power to pay all, or at least a portion of his debts; or when it is expected that a perverse and obstinate debtor will defend any action merely for the sake of annoyance; then, after a minute and careful examination of the amount, if it be quite clear that a certain debt, not reduced by set-off, can be safely sworn to, and afterwards *proved* by credible witnesses, then an affidavit of such debt and an arrest *may be justifiable*; especially when it is expected that the defendant, rather than continue in prison, or ask his friends to become bail, will pay the debt, or deposit the amount with £10 for *costs*; but even then the arrest should never be influenced by a desire of revenge or punishment, but purely in order to induce the deceptive debtor to give up the goods or property he has acquired, or to induce some of his companions to become sureties for and pay the debt. It can only be on

some ground of this nature that an arrest should be adopted, for certainly as regards *expedition* in a suit,ailable process may be *more dilatory* than serviceable. (q) At all events, every respectable attorney should, unless in such cases of fraud, rather dissuade his client *against an arrest*, than encourage him to indulge a feeling of resentment or revenge so derogatory to the character of a good member of society, and even baneful to his own true happiness.

There are also many preliminary considerations on the behalf of an *expected defendant*. The observations relative to a *written retainer* of a plaintiff's attorney are here equally applicable; (r) and it may be of essential importance that very explicit *instructions to defend* should be obtained in the first instance, and an outline of such instructions has been given in a note. (s) The defendant's attorney should apprize him, and even write down all essential directions, if an arrest be expected; and in case only part of a money demand is admitted to be due, the attorney himself, or an experienced clerk, should make a legal tender, and actually produce and count out the money, and offer to pay it without any condition or qualification. (t) But if the claim is not for a debt, but for damages, then a tender could not be pleaded; (u) and then if the case be within the 3 & 4 W. 4, c. 42, s. 21, or the antecedent practice, allowing money to be paid into Court, a sufficient sum should be paid accordingly; and even when a plea of tender would be admissible, if there should be any doubt about the sufficiency of the tender either in fact or law, or the proof of it, or whether a prior or subsequent demand may not be replied with effect, then the safest course is to *pay money into Court*, and plead *such payment* in the form prescribed by the general rule of Hil. T. 4 W. 4, s. 17. (x) In general, when a considerable sum has been paid into Court, it induces a favourable presumption on the part of the judge and jury afterwards trying the cause, that the defence is *bonâ fide*.

Eleventhly,
Subjects to be
considered by
an attorney for
a defendant.

(q) See further in chapter as to *capias*.

(r) *Ante*, 114.

(s) *Ante*, 121, 124.

(t) See *ante*, vol. i. 506, 507, as to what is or not a legal tender; and as to

the necessity for actual production of the money, *Finch v. Brook*, 1 Bing. N.C. 257, 258.

(u) *Barrell v. Dearn*, 3 Dowl. 13.

(x) See the rule *post*, and 2 Dowl. 13.

CHAPTER V.

OF MESNE PROCESS, AND PROCEEDINGS THEREON IN GENERAL.

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SECT. I.—OF MESNE PROCESS AND PROCEEDINGS THEREON IN
GENERAL.

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1. Subjects of this chapter.

WE are now to consider that part of the proceedings in personal actions, usually termed *mesne process*, being the writ or proceeding in an action to *summon* or *bring* the defendant into Court, or *compel* him to appear or put in bail, and then to hear and answer the plaintiff's claim. As most of the recent alterations in the practice of the superior Courts have been made with the view of *improving* such *mesne process*, it is of very great importance to have a full and accurate knowledge of the subject, and it is therefore proposed in this chapter very minutely to examine the *principles, enactments, rules and decisions* which affect all or most of the *five descriptions of*

process, now enjoined to be observed by the uniformity of process act, 2 W. 4, c. 39; and then in the subsequent chapters *separately* to consider *each* of those *five writs*, and the particular proceedings thereon, in practical detail.

It is obviously a principle of natural justice, and it is consequently a maxim in our municipal law, that no *one should be condemned unheard*; (a) and hence the necessity for *process* to be in general actually served on a defendant, thereby summoning or warning, or compelling him to appear in Court to hear the complaint against him. (a) And to such extent was this maxim carried in our ancient law, that a plaintiff could not declare or proceed in an action before the defendant had *actually appeared* in Court to answer the plaintiff; and even if he pertinaciously neglected or refused to appear, the only course was to issue *continued* process, or to *distrein* upon his goods, in order thereby, as it was expected, to induce him to appear, or to *outlaw him*, by which he incurred a qualified forfeiture of his lands and goods, and all his civil rights as a subject were suspended. As an additional stimulant the statute 9 & 10 W. 3, c. 25, s. 33, subjected a defendant who had been served with process to the forfeiture of £5, if he neglected to appear, and which may still be recovered summarily, and when the debt is small, might be a useful proceeding. At length the statute 12 G. 1, c. 29, s. 1, (explained and amended by 5 G. 2, c. 27,) upon an affidavit of actual *personal service* of the writ upon the defendant, and that he had not appeared within eight days after the return day of the writ, authorized the plaintiff *in any Court of Record* to enter an appearance for the defendant, called an appearance *sec. statuti*, (i. e. according to the authority of that statute); and thereupon to declare and proceed to judgment and execution, the same as if the defendant had himself appeared. The recent act 2 W. 4, c. 39, s. 3, extended the power of the plaintiff to enter an appearance for the defendant, pursuant to the prior statute, to certain proceedings upon a writ of *distringas*, as will hereafter be explained. But if the defendant were abroad, (b) or avoided the

2. Necessity for some process or notice to a defendant.

(a) Per Bayley, J. in *Williams v. Lord Bagot*, 3 B. & C. 772, 786; 5 D. & R. 719, S. C. which students should read, as shewing the practical application of that maxim as it affects process.

(b) Although the outlawry of a person who is abroad at the time of issuing the exigent *may be avoided by him*, *Bryan v.*

Wagstaffe, 5 B. & C. 314, yet it can only be avoided *on terms*, viz. of appearing, or in case of a bailable claim *perfecting bail* to a new action, 31 Eliz, c. 3, s. 3; and *post*, Chap. XI. on *Outlawry*; so that even outlawry in this respect illegal may still enable a plaintiff to enforce an appearance or bail above.

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service of process, and had no goods, (the distreining of which was considered nearly equivalent to actual service, because it was supposed the defendant would hear of that proceeding,) then the only course was, and still is, to proceed to *outlawry*; which we however have seen does not enable the plaintiff to proceed in his *action*, or to obtain *judgment therein*, but only causes a seizure of the lands, goods and property of the defendant, as forfeited to the *King* for the defendant's contumacy and disrespect of his process; but the plaintiff may thereupon, by application to the Court of Exchequer, or by petition, when his claim exceeds £50, obtain satisfaction of his debt by sale of the defendant's property seized under his outlawry, unless previously the defendant appear to the action, and enable the plaintiff to try the merits.

Such being the general principle and rule of law, it has therefore been holden, that a custom or practice in an *inferior Court*, not sanctioned *by statute*, to proceed to final judgment, upon hasty and unreasonable or unjust proceedings, *although the defendant has not appeared* in the suit, is illegal and void.^(c) And in the foreign islands or other dominions, a judgment against an absent defendant would be illegal, unless under particular circumstances; as where the defendant has actually been within the jurisdiction, and has then left the same without paying his debts there, especially when there is a public officer there particularly authorized to take care of the interests of absent persons.^(d)

On what principles mesne process should be framed and served or executed,

From these authorities and the best consideration, it is obvious that the main ingredients in all just process are, *first*, that it should by its terms explicitly inform the defendant *when* and in *what Court or office* he should enter his appearance or

(c) *Williams v. Lord Bagot*, in error, 3 B. & C. 772; 5 D. & R. 719. Such a custom to declare against a defendant before any entry of appearance by him, or some person for him, is bad in law; and it seems that a custom to issue a summons and attachment at the same time is also bad.

(d) *Buchanan v. Rucker*, 9 East, 192; 1 Stark. Rep. 525; 4 Bing. 686; *Baquet v. Macarthy*, 2 Barn. & Adol. 951. There are however some exceptions, as is that of the custom of London in the Mayor's Court to attach the goods of an absent party, or even a debt due to him in the hands of a third person within the jurisdiction, called the garnishee; and unless bail be put in, and the suit defended

within a year, the debt is thereby recovered against the garnishee, see *Turbill's case*, 1 Saund. Rep. 67. But, it will be observed, that such attachment is in the nature of a distringas on goods, of which it is supposed that the debtor will hear within a year, and thereupon appear in the action. The proceedings also by two scire facias to revive a judgment, or to enforce a recognizance of bail, and neither of which are even attempted to be served, constitute exceptions, but the latter proceeds on the doctrine that the party or bail ought to search. See *Smith v. Crane*, 8 Moore, 8; 3 Tyr. Rep. 388. But see observations of Tindal, C.J. in 7 Bing. 109; 5 Bing. 284.

put in bail; *secondly*, that it should be served upon him *in sufficient time*, to enable him, without inconvenient hurry, so to appear, or, according to modern practice, time to apply to an attorney in his neighbourhood, and direct him to instruct his agent in London to enter his appearance or put in bail in the proper office; and *thirdly*, in cases where the law permits a defendant immediately to pay a debt or adjust a claim without incurring any further expense, and, as it were, "meet his adversary by the way," it is reasonable and proper that *information of the nature and extent of the claim* which may be thus settled in the first instance, should be afforded by the first process. But as most defendants, when served with process, pretty well recollect that they owe the plaintiff a debt, or have committed a particular injury, and if they have forgotten the amount or nature of the claim, may readily apply and ascertain the same, and which the plaintiff would be ready, if not anxious, to receive, it seems to be scarcely necessary to require any great particularity in the writ as to the nature of the debt or claim; and as respects other demands, it will suffice for the defendant to ascertain the same from the *declaration* when delivered, or the auxiliary particulars of demand, which may be obtained even before appearance or bail above. There was therefore much good sense in the former practice of the Court of Exchequer in regard to particulars of demand, which that Court refused to compel the plaintiff to deliver, unless the defendant would swear that he had not received any account of the nature or particulars of the plaintiff's claim, and could not safely proceed to trial without such delivery.^(e) On the like principle it may be questionable whether so much particularity in the writ itself and its indorsements, as has been required by the modern enactments, is in justice essential? At least it is to be regretted that the infinite variety of requisites, accompanied with the right of the defendant to take advantage of any omission or mistake, however trifling, and which is not allowed to be amended, operate too much in delay and obstruction of justice.

As regards the *time* of serving the process, or the time to be afterwards allowed for appearance or putting in bail above, it will be found that according to ancient and long established practice, before the recent alterations, there was a general principle, that a person residing at a *considerable distance* from the metropolis should be allowed *more time* for perform-

Time of service.

(e) Dax's Prac.; Chit, Summary, Prac. 114.

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ing the act than a person within or very near to the metropolis, and it was considered important to fix the distance so as to depend on, whether the arrest was in London or Middlesex, when *four days* after the return day were allowed for putting in bail, or was in Surrey or any more distant county, when *six days* were allowed; (*f*) but now there is no distinction as regards process between an arrest on process in London or Yorkshire or Cornwall, and in each case without distinction the defendant must appear or put in bail above in *eight days* after the day of the service or arrest, *inclusive* of that day. Perhaps, now that the facilities of intercourse between the metropolis and the remotest parts of the country have become so established, there may be less reason than heretofore for continuing the distinction between distances, which certainly occasionally were the subjects of disputed discussion.

*Mode of service,
and why to be
personal.*

With respect to the *mode* of service, there is an obvious analogy between mesne process in an action, and process in other cases; and some principles may be extracted from the decisions respecting the service of a summons to answer an information before a justice of the peace, and of the proof thereof, before the justice can proceed to convict, viz. that in general, and unless otherwise directed, there must be *personal service*, (*g*) or evidence that the summons actually came to the party's possession *a reasonable time* before that appointed for the hearing, so as to enable him without ommissis omnibus aliis negotiis to appear, or the justice should not proceed, but issue a fresh summons. (*h*) For many purposes the leaving a written notice, as a notice to quit, in the actual possession of the wife or servant of a party at his residence, affords a reasonable inference that he actually received the same; (*i*) and in an action of ejectment the service of the declaration, (then in effect the first process,) upon the wife of the tenant in possession at his residence, suffices; but in all other cases of process the law, perhaps wisely, requires *actual notice of process to the defendant himself*; because such very important interests may be prejudiced by litigation, that it should not be left to mere presumption or inference that a party to be affected by it has

(*f*) Rule M. 8 Anne, reg. 1, K. B.; Tidd, 248.

(*g*) Per Parker, C. J. in *Rex v. Simpson*, 10 Mod. 345; *Rex v. Dyer*, 1 Salk. 181; *Rex v. Chandler*, id. 266; *Rex v. Com-*

mins, 8 D. & R. 344; *Rex v. Hall*, 6 D. & R. 84.

(*h*) *Id. ibid.*; ante, vol. ii. 177.

(*i*) *Doe d. Neville v. Dunbar*, 1 Moo. & M. 10; ante, vol. i. 483.

knowledge of the proceeding, but it should be positively and affirmatively established before any further proceeding in a suit be permitted. The seizure of the defendant's goods upon a *distringas* and the sale of them, unless he appear, has however been, and still is, considered a reasonable proceeding, and an effectual mode of inducing the party to pay due respect to the process, rather than have his goods detained, and still less sold.

The most ancient proceeding to summon or bring a defendant into Court, was an *original writ*, adapted to the nature of the plaintiff's cause of action, and issued out of the Court of Chancery, and returnable either in the Court of King's Bench or Common Pleas, (but in no case in the Court of Exchequer, (l) which originally was merely a Court of Revenue). (m) The Court of King's Bench or Common Pleas, into which the original writ was so returnable, thereupon issued a *capias* or summons, depending on the form of the original writ. The numerous forms of such original writs, adapted to the usual circumstances of contracts and wrongs, then comparatively few, will be found in the ancient collection called *Registrum Brevium*. Each of the superior Courts also, by a particular process of its own, held cognizance over causes of action by and against the officers and attornies of that particular Court; and the Court of Exchequer had actual and constitutional jurisdiction over debts and causes of action when due to an *actual debtor* of the king, who by the detention of the debt, or in consequence of the injury, was in fact, or supposed to be *less able* (*quo minus*) to pay the debt due to the king. The Court of King's Bench also, as an incident of its criminal jurisdiction, had not only cognizance over civil claims when due from or to an officer of their Court, and issued a peculiar process for the recovery thereof, but also over all civil matters when the defendant was in the *actual custody* of the marshal for a *trespass* committed in the county where the Court sat. The Common Pleas also had an incidental jurisdiction of the

3. The ancient process, and those existing immediately before the uniformity of process act 2 W. 1, c. 39, (l) and some inconveniences resulting from the same.

(k) See the clear account of the former writs in Mr. Tidd's Addenda to the 9th ed. of his *Practice Supplement* of A.D. 1832, page 1 & 2. Students should also read the Appendix to Sellon's *Practice*, for a succinct account of the usurped jurisdiction of the superior Courts, and Gilbert's *Prac. C. P.*

(l) See 1 Price's Rep. 309, 1 Tyrw. Rep. 289, in note, as to no *original* writ having been returnable in the Court of Exchequer, Tidd, *ib. ante*, vol. ii. p. 91.

(m) And consequently there could be no outlawry in that Court until the 2 W. 4, c. 39, s. 5, Tidd's Supp. 100.

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same nature. For a time each Court correctly confined itself to its appropriate though limited jurisdiction; but as we are historically informed, each of the three superior Courts soon lost sight of the true limits of its jurisdiction, and unworthily descended to fictitious and subtle contrivances to acquire co-extensive jurisdiction over all debts and claims of a civil nature, and the ancient distinct jurisdiction of the three Courts was entirely forgotten; and the legislature have by several acts of the present reign, and by his majesty's warrant throwing open the Court of Common Pleas, not only sanctioned those illegal accessions of jurisdiction, but have even introduced regulations calculated to render the three Courts co-extensive in jurisdiction over most *private personal civil actions*.⁽ⁿ⁾ The numerous writs in force before, and abolished by the uniformity of process act, 2 W. 4, c. 39, were the offsprings of such degrading contrivances; viz. in the *King's Bench*, the bill of Middlesex, and latitat with or without an *ac etiam*, with the alias *capias*, pluries *capias*, and *testatum capias*, into another county; attachments of *privileges* at the suit of an officer or attorney of the Court; bills against members of parliament, &c. &c. In the *Common Pleas*, the *capias ad respondendum*, and *capias quare clausum fregit*; attachment of privilege, &c. &c. In the *Exchequer*, the writ of *quo minus*, for a mere *pretended* debtor to the king, (but who in fact was not so); the *subpœna ad respondendum, venire, distringas*, &c.; with in each Court almost innumerable other varying proceedings. The ancient original writs fell into disuse excepting when it was essential to proceed to *outlawry*, and which was the only form of process (excepting in the solitary instance of an action on a recognizance of bail) where the *body* of the writ disclosed the subject-matter of the debt or claim, though by the singular and uncouth contrivance of an *ac etiam* clause at the foot of bailable process, the defendant was informed in bailable actions of the *form* of action intended to be declared upon, though not of the *precise nature* of the debt or claim.

The several processes, excepting when founded on an original writ, were moreover not absolutely considered the commencement of the action, but might at the option of a plaintiff be so treated or used merely to bring the defendant into Court, and then to answer *some* complaint thereafter to be made; and hence they might be issued, and the defendant even arrested *before the cause of action was complete*, or even had its incep-

(n) *Ante*, vol. ii. 304 to 312.

tion, (o) though the Court would sometimes exercise a just control in that case over the vexatious costs thus prematurely incurred. (p) But since the uniformity of process act, 2 W. 4, c. 39, process is *in all cases* and to all intents considered the commencement of the action, and no cause of action or set-off *subsequently* accrued due can be given in evidence. (q) Moreover, when the defendant or several defendants had appeared, he or they might be declared against either separately or jointly, at the option of the plaintiff, and in any form of action. The writ also, excepting when by original, contained no statement of the residence or other description of the defendant, and hence it sometimes occurred that when there were several persons of the same name, the wrong person was served or arrested; and as the writ, even in an action of debt, contained no statement of the amount of the sum claimed, or the amount of the costs, the defendant did not know what sum would satisfy the plaintiff. As writs might also be returnable on the very day they were issued, and the plaintiff might even declare on the same day, (r) the defendant for want of the allowance of some time in order to consult his attorney, or obtain money to satisfy the debt, was immediately involved in so rapidly an increasing expense, that it frequently occurred that before the defendant could obtain an order to stay proceedings on just terms, the costs even exceeded the debt; whilst from the infinite variety in the process and proceeding founded on the same, and issued from or transacted in different public offices by different officers, whose practice in some small respect differed, and who required different fees, and such writs and proceedings had different teste and return days, in which great accuracy was required, the plaintiff's attorney was frequently in error, of which the defendant, through his attorney, took vexatious advantage; and if, after great delay, he remained able to pay the debt, he was not in general liable to pay interest, or more than taxed costs, being sometimes less than those incurred by the plaintiff.

It must be admitted that these and some other inconveniences have certainly been in a great measure removed by the uniformity of process act, 2 W. 4, c. 39, and some other enactments and rules thereon; but it has been urged that other

4. The five several writs substituted by 2 W. 4, c. 39, and some objections suggested to the same.

(o) *Best v. Wilding*, 7 T. R. 4; *Swan-cott v. Westgarth*, 4 East, 75; *Davis v. Owen*, 1 Bos. & Pul. 543; *Pineo v. Wright*, 2 Bos. & Pul. 235. But the cause of action must have arisen in the term when the writ was returnable, *Smith*

v. Muller, 3 Term R. 624.

(p) *Kerr v. Dick*, 2 Chitty's Rep. 11.

(q) *Thompson v. Dicus*, 3 Tyrw. Rep. 873, and *post*, 159.

(r) *Osborne v. Davidson*, 4 Term Rep. 610.

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inconveniences have been introduced by requiring *too many technical and really unimportant points to be attended to in framing and serving process*, and in giving to them the *same* importance as if the *merits* were affected, and by *not permitting amendments*, but compelling the plaintiff to begin *de novo*, although perhaps the defendant cannot afterwards be arrested or served with the fresh process in a new action.

Statement of
outline of regu-
lations in 2
W. 4, c. 39.

The uniformity of process act, 2 W. 4, c. 39, s. 1, after reciting that *the process for the commencement of personal actions in the superior Courts of law at Westminster, then was, by reason of its great variety and multiplicity, very inconvenient in practice, virtually abolished the same by substituting five other writs, one of which must be adopted, (s) and by enacting, in the 21st section, that those writs shall be the only writs for the commencement of personal actions in the superior Courts therein named, in the cases to which such writs are applicable, after the 1st November, 1832. Of these writs, or modes of proceeding, it is to be observed, that only four are primary or to be issued in the first instance, and the other new writ is secondary or issued after a former writ, and in order the better to enforce an appearance or bail above. Thus, the ordinary writ of summons may be issued against every description of persons, and in every case when the defendant cannot legally be, or is not intended to be arrested. The writs of *capias* and of *detainer* are only to be issued when a single defendant, or at least one of several defendants is to be arrested, or being already in the prison of one of the Courts, is to be there detained. And the writ of *summons* against a *member of parliament*, though one of the primary writs, is only issued when such privileged person is a trader, and it is proposed to issue a fiat in bankruptcy against him if he do not appear in due time. The writ of *distringas* is always preceded by a writ of summons, and is issued only in default of the defendant's appearance to such first writ, and is therefore termed *secondary* process. The proceedings to *outlawry* by writs of exigent and proclamation, must also always be preceded by a writ of summons or *capias*, and are therefore also termed secondary. So all alias and pluries writs, whether of summons, *distringas* or *capias*, being in continuation of the first, are secondary. (t)*

(s) The clear enumeration by Mr. Tidd of the multifarious processes antecedent to the uniformity of process act, 2 W. 4, c. 39, certainly justifies this re-

citatal. See Mr. Tidd's Observations on the Uniformity of Process Act, A. D. 1832, page 1, 2.

(t) Tidd, 63; Price, Gen. Pr. 11.

It seems to have been the intention of the legislature, by this act, not only to *reduce the number* and variety of the writs then in force, but also to *require more explicit information* to be given by such new process and memoranda, warnings and indorsements, and probably thereby to enable a defendant himself, by the information given by the process, to act in all re-

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Object of the legislature to afford more certain and explicit information to defendants; but certain inconveniences introduced. (u).
Objections suggested to enactment, 2 W. 4, c. 39, and rules thereon.

(u) It is true that each requisite *might* with great care be strictly and accurately observed without the exercise of any extraordinary intelligence on the part of the legal practitioner; but experience has evinced that it is frequently otherwise, and as the delay and expense occasioned by these really unimportant irregularities principally injures the *client*, who is not to blame, he and the public will naturally complain that effect should be allowed to such *trifling objections*, delaying, if not actually defeating, the remedy, and it must be painful to counsel to be compelled, by what is considered professional duty, to obey his disgraceful instruction to move to set aside process for a just debt, merely because in the copy of process a single letter has been omitted as *l* in Middlesex, in the name of the county, to the sheriff of which the writ itself was directed, although not in a part of the writ which affects to offer any information to the defendant, or merely because the form of action has been described "action on the case upon promises," instead of "action on promises,"* especially as a defendant, immediately he has been served with any process not stating any form of action, may immediately and before his appearance, obtain explicit particulars of the plaintiff's demand by summons and order of a judge.† It is submitted that there is an imperative call for legislative amelioration of the newly invented practice, which, by the uniformity of process act, has subjected the administration of justice to many objections. If the object of the legislature really was by every writ with its memoranda, warnings, and indorsements, to give to every defendant such explicit information of the cause of action as a bill in Chancery, setting forth the detail of the complaint, and such practical directions *what* he has to perform and *how*, that he might himself take *all* requisite measures without consulting an attorney, then the enactments, even with the rules thereon, fall very short of affording all such requisite information. Thus there is no intimation to the defendant by a bailable capias of his right to insist on being taken for the first twenty-four hours after his arrest to a third person's house in the county, and within three miles, not being a gaol or lock-up house, and that the officer refusing forfeits 50*l*.;‡ nor is there any direction on serviceable process at what particular office of the proper Court, or how the defendant shall enter his appearance; and when a defendant appears in person there is no requisition that the appearance shall state his residence, or where the plaintiff may serve him with a declaration or other proceeding, and in many other respects full information, essential to enable a defendant to act for himself, is *withheld*, or at least not afforded by the 2 W. 4, c. 39, or the rules thereon; nor is there in a writ of summons any notification to the defendant that if he should avoid the process and not appear, a distringas will issue against his goods. §

If on the other hand it is to be supposed that the defendant, when served or arrested, will consult an attorney what he is to do, or rather employ him to transact all measures for him as is the constant practice, then there is no occasion for such great particularity in the writ and indorsements, because that attorney must or ought to be able readily to afford all requisite information upon the most cursory examination of the most general writ, merely requiring the defendant to enter his appearance, or put in bail in the proper Court; at least there seems to be no necessity for visiting a plaintiff with so many serious consequences for his attorney's deviating from the prescribed forms, and unless a party, in support of his application to set aside the proceeding on account of a deviation from a prescribed form, will swear and *satisfy the Court* that he has *really been misled and prejudiced*, there is no reason why the proceeding should be set aside, and if it be essential for the sake of uniformity that the prescribed form should be *strictly* observed, that object might be attained by empowering the Court or a judge to subject the practitioner to some discretionary pecuniary penalty, and in case of repetition he might be suspended either temporarily or absolutely from assuming to practise, and it seems a harsh rule that a *suitor* shall have his proceedings set aside, and not even permitted to amend on payment of costs.

* *King v. Skeffington*, 1 Dowl. 686; 1 Crom. & M. 683; S. C. 1 Arch. K. B. 4 edit. 515; *Davies v. Parker*, 2 Dowl. 589.

† Chitty's Rep. 724, 5, K. B. Rule

Trin. T. 2 G. 4, C. P.; 3 Moore, 211.

‡ 32 G. 2, c. 28, s. 1 & 12; 1 Cromp. & M. 365.

§ Price's Gen. Prac. 18, note *.

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spects for himself, independently of any attorney. No objection could reasonably be urged to the requiring such explicit

2 WILL. 4, c. 39.

An Act for the Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster. [23d May, 1832.]

Serviceable process for the commencement of personal actions.

WHEREAS the process for the commencement of personal actions in his Majesty's superior Courts of Law at Westminster is, by reason of its great variety and multiplicity, very inconvenient in practice; for the remedy thereof be it enacted, that the process in all such actions commenced in either of the said Courts in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament according to the provisions contained in the statute passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act to amend the Laws relating to Bankrupts*, shall, whether the action be brought by or against any person entitled to the privilege of peerage or of parliament, or of the Court wherein such action shall be brought, or of any other Court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed marked No. 1, and which process may issue from either of the said Courts, and shall be called a writ of summons; and in every such writ and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by the officer of the said Courts respectively by whom process serviceable in the county therein mentioned hath been heretofore issued from such Court;* and every such writ may be served in the manner heretofore used in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere, and the person serving the same shall and is hereby required to indorse on the writ the day of the month and year of the service thereof.

Mode of appearance to serviceable process.

II. And be it further enacted, that the mode of appearance to every such writ, or under the authority of this act, shall be by delivering a memorandum in writing according to the form contained in the said schedule, and marked No. 2, such memorandum to be delivered to such officer or person as the Court out of which the process issued shall direct, and to be dated on the day of the delivery thereof.

Appearance may be enforced by writ of distringas in case a defendant cannot be served with the writ of summons.

III. And be it further enacted, that in case it shall be made appear by affidavit to the satisfaction of the Court out of which the process issued, or in vacation, of any judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons as herein before mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case it shall be lawful for such Court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such Court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or if not, shall be left at the place where such distringas shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or in vacation; and if such writ of distringas shall be returned non est inventus et nulla bona, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit to the satisfaction of the Court out of which such writ of distringas issued, or in vacation, of any judge of either of the said Courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such Court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution.

Bailable process for the com-

IV. And be it further enacted, that in all such actions wherein it shall be intended to arrest and hold any person to special bail who may not be in the custody of the

* Altered as to the officer to sign all writs from King's Bench by 3 & 4 W. 4, c. 67, s. 1.

information in process *if the statute had limited the consequences of accidental deviation.* But unfortunately these new

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Marshal of the Marshalsea of the Court of King's Bench or of the Warden of the Fleet Prison, the process shall be by the writ of *capias* according to the form contained in the said schedule and marked No. 4; and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon or served therewith, shall be delivered therewith to the sheriff or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall upon or forthwith after the execution of such process cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest; and if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may before the end of the next term after the detainer or arrest of such defendant declare against such defendant, and proceed thereon in the manner and according to the directions contained in a certain act of parliament made in the fourth and fifth years of the reign of King William and Queen Mary, intitled *An Act for delivering Declarations against Prisoners*: Provided always, that it shall be lawful for the plaintiff or his attorney to order the sheriff or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or other officer or person; and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other.

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personal actions.

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c. 21.

V. And be it further enacted, that upon the return of non est inventus as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of non est inventus and nulla bona as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to *outlaw* or *waive* such defendant by writs of *exigi facias* and *proclamation* and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of *capias ad respondendum* issued after an original writ: Provided always, that every such writ of exigent proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed.

Proceedings to
outlawry.

VI. And be it further enacted, that after judgment given in any action commenced by writ of summons or *capias* under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: Provided always, that every outlawry or waiver had under the authority of this act shall and may be vacated or set aside by writ of error or motion, in like manner as outlawry or waiver founded on an original may now be vacated or set aside.

Proceedings to
outlawry may
be had after
judgment given
under the authority
of this act.

VII. And be it further enacted, that for the purpose of proceeding to outlawry and waiver upon such writs of *capias* or *distringas* returnable in the Court of Exchequer, it shall and may be lawful for the Lord Chief Baron of the said Court, and he is hereby required, to appoint from time to time a fit person, holding some other office in the said Court, to execute the duties of a filicer, exigenter, and clerk of the outlawries in the same Court.

Filicer to be
appointed in the
Court of Exchequer.

VIII. And be it further enacted, that when it shall be intended to detain in any such action any person being in the custody of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet Prison, the process of detainer shall be according to the form of the writ of *detainer* contained in the said schedule and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered together with such process to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said Courts, and the declaration thereupon shall

Mode of detaining
a prisoner in
the custody of
the Marshal or
of the Warden
of the Fleet.

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regulations have occasioned so great an increase of trifling motions and summons to set aside proceedings for really unim-

Mode of proceeding against a member of parliament to enforce the stat. 6 G. 4, c. 16, s. 10.

Duration of writs.

Proviso as to statute of limitations.

Proceedings on writs served or executed at certain times.

Proviso for Sunday, &c.

Date and teste of writs.

Indorsement of the name of the attorney or party suing.

Service of writs of summons on corporations and on inhabit-

and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the judges of the said Courts.

IX. And be it further enacted, that in all such actions wherein it shall be intended to proceed against a *member of parliament* according to the provisions of the said statute made in the sixth year of the reign of his late Majesty King George the Fourth, the process shall be according to the form contained in the said schedule marked No. 6, and which process and a copy thereof shall be in lieu of the summons, or original bill and summons and copy thereof, mentioned in the said statute.

X. And be it further enacted, that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ, (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in *baile* process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same, as the case may be.

XI. And whereas, according to the present practice, in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any term until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created; for remedy thereof be it enacted, that if any writ of summons, *capias* or detainer, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then and in every such case the Wednesday after Easter Day shall be considered as the last of such eight days: Provided also, that if such writ shall be served or executed on any day between the 10th day of August and the 24th day of October in any year, special bail may be put in by the defendant in bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days: Provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said 10th day of August and 24th day of October.

XII. And be it further enacted, that every writ issued by authority of this act shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said Court, and shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out: but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

XIII. And be it further enacted, that every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the

portant irregularities, so unworthy of a superior *Court of Justice*, that it is to be feared that more inconvenience than benefit

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high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, on some peace officer thereof.

ants of hundreds and towns.

XIV. And be it further enacted, that it shall and may be lawful to and for the judges of the said Courts, and they are required from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper, and for that purpose to meet as soon as conveniently may be after the passing hereof.

General rules to be made by the judges.

XV. And be it further enacted, that it shall be lawful in term time for the Court out of which any writ issued by authority of this act, or any writ of *capias* ad satisfaciendum, *fiat facias*, or *elegit* shall have issued, to make rules, and also for any judge of either of the said Courts in vacation to make orders for the return of any such writ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court.

Rules and orders made for the return of writs.

XVI. And be it further enacted, that all such proceedings as are mentioned in any writ, notice or warning issued under this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

Proceedings in default of appearance or special bail.

XVII. And be it further enacted, that every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court or any judge of the same or of any other Court shall so order and direct, declare in writing, within a time to be allowed by such Court or judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall have appeared to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court or any judge of either of the said Courts shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance.

Attorney to declare whether writ sued by his authority; and to declare name and place of abode of his client, if ordered.

XVIII. And be it further enacted, that it shall and may be lawful to and for the judges of each of the said Courts from time to time to make such rules and orders for the government and conduct of the ministers and officers of their respective Courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of this act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors.

If writ not issued by authority of the attorney, the defendant may be discharged.

XIX. Provided always and be it further enacted, that nothing in this act contained shall subject any person to arrest, outlawry or waiver, who by reason of any privilege, usage or otherwise, may now by law be exempt therefrom, or shall extend to any cause removed into either of the said Courts by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise.

Rules to be made by the Courts for the government of their ministers and officers.

XX. And whereas there are in divers parts of England certain districts and places parcel of some one county, but wholly situate within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said Courts; for remedy thereof be it enacted, that every such district and place shall and may for the purpose of the service and execution of every writ and process, whether *mesne* or *judicial*, issued out of either of the said Courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties.

Proviso for persons privileged from arrest, &c. Places, parcel of one county and situate in another, to be deemed part of each.

XXI. And be it further enacted, that from the time when this act shall commence and take effect, the writs hereinbefore authorized shall be the only writs for the commencement of personal actions in any of the Courts aforesaid, in cases to which such writs are applicable; and the costs to be allowed and charged for such writs shall be the same as for writs of *latitat*: Provided always, that nothing in this act contained shall abridge, alter or affect the franchises and jurisdictions of either of the counties palatine of Lancaster or Durham, or of any officer or minister thereof.

Writs hereinbefore authorized to be the only writs for commencement of personal actions.

XXII. And be it further enacted, that this act shall commence and take effect on the first day of Michaelmas term next after the passing thereof.

Commencement of act.

XXIII. And be it further enacted, that this act may be amended, altered or repealed during the present session of parliament.

Act may be altered this session.

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has arisen from the requisition of so much particularity. And it would certainly be desirable if process were rendered more

SCHEDULE to which this act refers.

No. 1. *Writ of Summons.*

WILLIAM the Fourth, &c.

To C. D. of, &c. in the county of —, Greeting :

We command you [or as before or often we have commanded you] that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of —, in an action on promises [or as the case may be] at the suit of A. B. And take notice, that in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution.

Witness — at Westminster the — day of —.

*Memorandum to be subscribed on the Writ.**

N.B.—This writ to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before Service thereof.

This writ was issued by E. F. of —, attorney for the said A. B.

Or,

This writ was issued in person by A. B. who resides at — [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by me X. Y. on — the — day of —, 18—.

X. Y.

No. 2. *Forms of entering an Appearance.*

A., plaintiff against C. D. { The defendant C. D. appears in person.

or,
against C. D. and another, { E. F. attorney for C. D. appears for him.

or,
against C. D. and others. { G. H. attorney for the plaintiff, appears for the defendant
C. D. according to the statute.

Entered the — day of —, 18—.

No. 3. *Writ of Distringas.*

WILLIAM the Fourth, &c.

To the sheriff of — Greeting :

We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of — to answer A. B. in a plea of trespass on the case [or debt, or as the case may be]; and how you shall execute this our writ you make known to us in our said Court on the — day of — now next ensuing.

Witness — at Westminster the — day of — in the — year of our reign. *

Notice to be subscribed to the foregoing Writ.

In the Court of —.

Between { A. B. plaintiff,
and
C. D. defendant.

Mr. C. D.

Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said Court to answer the said A. B. according to the exigency of a writ of summons bearing teste on the — day of —; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

simple than under the present regulation, or at least some limit were imposed to those vexatious proceedings. (u)

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No. 4. *Writ of Capias.*

WILLIAM the Fourth, &c.

To the Sheriff of ———,

or,

To the Constable of Dover Castle,

or,

To the Mayor and Bailiffs of Berwick-upon-Tweed,

or,

[as the case may be,]

Greeting :

We command you, [or as before or often, we have commanded you,] that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of ——— if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made deposit with you according to the law in an action on promises [or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of ——— to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And we do further command you the said sheriff, that immediately after the execution hereof you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereunto required by order of the said Court or by any judge thereof.

Witness ——— at Westminster the ——— day of ———.

Memoranda to be subscribed to the Writ.

N.B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the statute 7 & 8 G. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond.

4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £ ——— by affidavit.

or,

Bail for £ ——— by order of [naming the judge making the order], dated the ——— day of ———.

This writ was issued by E. F. of ——— attorney for the plaintiff [or plaintiffs] within named.

Or,

This writ was issued in person by the plaintiff within named, who resides at ———, [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

(u) See further objections, ante, 149, n. (n).

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As the terms of the enactments in 2 W. 4, c. 39, and of the forms prescribed in the schedule, (v) and of the rules of Court made thereon in pursuance of sect. 14, (w) are subjects of such frequent reference, it is expedient to insert them in the subscribed notes. (w)

The practical
operation of
2 W. 4, c. 39.

The statutes 2 W. 4, c. 39, intituled "An Act for *Uniformity of Process in Personal Actions* in his Majesty's Courts of Law at Westminster," passed 23d May, 1832, and which commenced in operation on the first day of the subsequent Michaelmas term, has *totally changed* as well the substance as the forms of antecedent *mesne process* in *most personal* actions, as well as many proceedings thereon, by expressly enacting that the writs thereinbefore authorized (and presently described) "shall be *the only writs* for the *commencement* of

No. 5. Writ of Detainer.

WILLIAM the Fourth, &c.

To the Marshal of the Marshalsea of our Court before us [or, To the Warden of our Prison of the Fleet.]

We command you, that you detain C. D. if he shall be found in your custody at the delivery hereof to you, and him safely keep, in an action on promises [or of debt, &c. *as the case may be*,] at the suit of A. B., until he shall be lawfully discharged from your custody. And we do further command you, that on receipt hereof you do warn the said C. D. by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our Court of — to the said action; and that in default of his so doing the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you the said [marshal or warden, *as the case may be*,] that immediately after the service hereof you do return this our writ, or a copy hereof, to our said Court, together with the day of the service hereof.

Witness — at Westminster the — day of —.

N.B.—This writ is to be indorsed in the same manner as the writ of *capias*, but not to contain the warning on that writ.

No. 6. Writ of Summons to be served on a Member of Parliament in order to enforce the Provisions of the Statute 6 G. 4, c. 16, s. 10.

WILLIAM the Fourth, &c.

To C. D. of, &c. — Esquire, having privilege of parliament, Greeting :

We command you, that within one calendar month next after personal service hereof on you, you do cause an appearance to be entered for you in our Court of — in an action [on promises, debt, &c. *as the case may be*,] at the suit of A. B.; and you are hereby informed that an affidavit of debt for the sum of — hath been filed in the proper office, according to the provisions of a certain act of parliament made and passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," and that unless you pay, secure or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness — at Westminster the — day of —.

N.B.—This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

Direction.—This summons is to be indorsed with the name of the plaintiff or his attorney in like manner as the writ of *capias*.

(v) *Ante*, 150 to 156.

(w) *Post*, 160, note (m).

personal actions in any of the three superior Courts of Law at Westminster, in cases to which such writs are applicable."(x) Consequently it must be kept in view, *first*, that the act is confined to *personal actions commenced* in one of the superior Courts, and does not extend to process in *real or mixed actions*, as *dower, quare impedit, or ejectment*;(y) *secondly*, that it does not affect actions *removed from inferior Courts*, such as *replevin*, usually commenced in and removed from the County Court by *recordari facias loquelam* into one of the superior Courts,(z) or removed by *habeas corpus, &c.*;(a) and *thirdly*, that it does not affect proceedings in *scire facias*, (though in some respects a personal action,) because, amongst other reasons, the forms prescribed by the act are not, in the language of the 21st section of the act, *applicable to scire facias*.(b) It will, therefore, still be necessary, as regards *those* proceedings, to refer to the previous forms, and observe the distinctions between *terms* and *vacations* and general return days.(c) But for most *practical* purposes the forms and proceedings directed by the above act to be adopted, with the *rules* thereon, must be *imperatively observed*, at the risk of a summons or motion to set the same aside for irregularity, and the necessity to begin *de novo*. And although some useful works on practice intimate that this would only be so when the deviation is *material*,(d) and there are certainly some recent cases favouring that view,(e) yet we have seen that in some of the principal decisions on the act, the Courts have declared that they will treat *all* deviations as fatal, whether *material* or not; for otherwise they would incessantly have to hear acute and refined distinctions between what irregularities are or not material,(f) and even in construing the word *material*, it will be found that a *technical*, not a natural view, is taken; for who but a lawyer would consider that the omission of a letter, as *Middlesex* instead of *Middlesex*, or *sheriff* instead of *she-*

(x) 2 W. 4, c. 39, s. 21; but see rule M. T. 3 W. 4.

(y) Tidd's Supp. 1833, p. 62, as to *ejectment*, so held in *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253; *Doe d. Fry v. Roe*, 3 Moore & S. 870; *Doe d. Haines v. Roe*, 2 Moore & S. 619.

(z) Tidd's Supp. 1833, p. 62.

(a) And see sect. 19.

(b) Tidd's Supp. A.D. 1833, p. 63; Atherton, 4, 6; Wordsworth on Rules of Court, 8. n. (8), so ably composed as to render it desirable the author would extend his labours.

(c) See in general 3 Bla. Com. Chap.

XVIII.; and see Tidd's Supp. 1833, where see a perspicuous summary of the several processes antecedent to 2 W. 4, c. 39; and see Com. Dig. tit. Process. So that practitioners have by the uniformity of process act, 2 W. 4, c. 39, to attain an *accumulation*, not an *exchange*, of technical knowledge.

(d) *Pocock v. Mason*, M. T. 1834, 1 Bing. New Cases, 245; S. P. 9 Legal Observer, 109; Arch. Pr. by T. Chitty, 4th ed. 112, 113, 518; 1 Arch. Pr. C. P. 23.

(e) See further post.

(f) *Ante*, 71; and rule M. T. 3 W. 4.

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riffs of London, in the copy of a *capias* delivered to a defendant who had been arrested upon the *capias* itself, should be deemed *material*, all other memoranda, warnings, indorsements and information to the defendant in such copy being perfectly correct. (g) In short, the few instances in which it will be presently seen the Courts have considered the deviations so trifling and immaterial as not to constitute a valid legal objection, have arisen from the natural dislike, and even disgust, which the judges must ever feel in giving effect to objections utterly wide of the merits, but can never be relied upon as forming a rule or exceptions on which any practitioner can safely rely in excuse for ignorance or blunder.

Enumeration and consideration of the five different forms of process, one of which must now be adopted under 2 W. 4, c. 39.

Such uniformity of process act, 2 W. 4, c. 39, s. 1, prescribes that one of the *five different forms of process* shall in such *personal* actions be adopted, and not the writs previously in use, viz., 1st, A writ of *summons*, to be *personally served* in ordinary cases upon one or more private individuals, whether privileged or not, and corporations, or the inhabitants of a hundred or other district, and which may also be served upon a single defendant, when he is in prison at the suit of a third person; 2dly, A writ of *distringas*, properly with the view of seizing the defendant's goods to the value of 40s., in case of inability to serve the writ of *summons personally*, though sometimes as the preliminary of proceedings to outlawry; 3dly, A writ of *capias*, to *arrest* a party who is at large, or already in custody of a *sheriff*; 4thly, A writ of *detainer* against a person already in the prison of one of the Courts; and 5thly, A writ of *summons*, to be served on a *member of parliament*, in order to enforce the provisions of the Bankrupt Act, 6 G. 4, c. 16, s. 10. The same statute also, in sections 5, 6 and 10, contains enactments regulating the new proceedings to *outlawry*, and to save the *statute of limitations*.

All process must still be in English, &c.

Before the uniformity of process act, all the numerous processes returnable in the different Courts of law at Westminster, were regulated by the 12 G. 1, c. 27; 5 G. 2, c. 27; and 21 G. 2, c. 3; and 7 & 8 G. 4, c. 71, which required that the writ, process, declaration, and all other proceedings, should be *in the English tongue, and written in words at length*, in a common legible hand and character, and which direction is still *virtually in force*, although all the antecedent forms of writs

(g) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Nicol v. Boyn*, 10 Bing. 339.

have been abolished by the 2 W. 4, c. 39, and others substituted.

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Before the uniformity of process act, process not by original might issue before the cause of action was complete, it being considered as issued merely to bring the defendant into Court, and this as well in bailable as serviceable process; (*h*) but now the suing out the writ of summons, and all the other writs thereby prescribed, are to be considered as the *commencement* of the action for all purposes, and cannot be issued before the cause of action is complete, (*i*) or the plaintiff would be non-suited or have a verdict against him; and therefore in a late case it was held, since the passing of the act, that a writ of summons is to be considered as the commencement of the action, and the declaration must correspond with the form of action specified in the writ; and if the declaration is in a different form of action, it is irregular, and the Court will set it aside, leaving the plaintiff to declare on the writ, if he can do so, according to his cause of action. (*j*) On the other hand a defendant cannot avail himself of a ground of defence, which clearly was not perfected until after the writ was issued. (*k*) Formerly, on the trial of an action, it frequently became material to prove the time when the action was commenced, and if the first writ was not in Court nor any witness there to prove the time, injustice arose; but those inconveniences are now removed by the 2 W. 4, c. 39, s. 12, requiring the exact day of issuing mesne process to be always inserted therein, and by the rule of Hilary term, 4 W. 4, requiring the issue and record, and writ of trial to the sheriff, also to state the teste of the first writ in those proceedings.

The writs under 2 W. 4, c. 39, are now considered the commencement of an action.

It will be observed that the 14th section of 2 W. 4, c. 39, in express terms requires the judges from time to time to make such general rules and orders for the *effectual execution of that act*, and of the intention and object thereof, and for fixing the *costs* to be allowed for and in respect of the matters contained in the act and performance thereof, as in their judgment should be deemed necessary or proper. (*l*) And accordingly in Michaelmas term, 3 W. 4, 2d November, 1852, all

THE RULES OF COURT made in pursuance of 14th section of 2 W. 4, c. 39.

(*h*) *Best v. Wilding*, 7 Term Rep. 4; 4 East, 75; 1 Bos. & P. 543; 2 B. & P. 235; 2 Chitty's R. 11.

(*i*) *Alston v. Underhill*, 1 Crompt. & M. 492, 768; 3 Tyr. 427.

(*j*) *Thompson v. Dicus*, 1 Crompt. & M. 768; 3 Tyr. 873.

(*k*) *Worswick v. Bcswick*, 10 Bar. & Cres. 676.

(*l*) *Ante*, 153, in note.

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THEREON.

the judges, excepting Lord Denman, C. J., (who had not then taken his seat,) promulgated *several General Rules*,^(m) and on

(m) *Reg. Gen. Michaelmas Term, 3 William IV.—2nd November, 1832.*

REG. I.

The General
Rules of Mich.
T. 3 W. 4,
A.D. 1832, re-
lating to mesne
process.

1. It is ordered, That every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants [if more than one] in the action, and shall not contain the name or names of any defendant or defendants *in more actions than one*.*

2. It is further ordered, That the following fees shall be taken :—

	£.	s.	d.
For signing all writs for compelling an appearance, whether of <i>summons</i> , <i>distringas</i> , <i>capias</i> , or <i>detainer</i> , and whether the same shall be the first writ, or an <i>alias</i> or <i>pluries</i> writ, and whether the same shall issue into the same county as the preceding writ, or into a different county..	0	2	6
For sealing the same	0	0	7
For entering an appearance for every defendant.....	0	1	0
Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant	0	0	4

3. It is further ordered, That the person serving a writ of *summons* shall, within three days at least after such service, *indorse on such writ* the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made.

4. It is further ordered, That the sheriff or other officer, or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall within six days at the least after execution thereof, whether by *service* or *arrest*, indorse on such writ the true day of the execution thereof, and in default thereof shall be liable in a summary way to make such compensation of any damage which may result from his neglect as the Court or a judge shall direct.

5. It is further ordered, That the second rule of Hilary Term, 1832, shall be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the said act, and to the copy of every such writ.†

6. It is further ordered, That any *alias* or *pluries* writ of *summons* may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case, upon the *alias* or *pluries* writ of *summons* describing the defendant as late of the place of which he was described in the first writ of *summons*, and upon the *alias* or *pluries* writ of *capias*, referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

7. It is further ordered, That the *alias* or *pluries* writ of *summons* into another county shall be in the following form :—

William the Fourth, &c.

To C. D., of —, in the county of —, late of —, in the county of —, [original county.] We command you as before [or often] we have commanded you, &c. [as in the writ of *summons* No. 1 in the schedule of the said act.]

* In consequence of the words in *italic* this rule has been construed not to preclude the plaintiff on serviceable process against several to declare only against one, provided there be no further proceedings against the others, *Evans v. Whithead*, 2 M & R. 367; *Bowles v. Bilton*, 2 Cr. & J. 474; Arch. by T. Chitty, 220, 222.

† This refers to the following rule. "And it is further ordered, That upon every *bailable* writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, *arrest*, or copy and service and attendance to receive debt and costs, and that upon payment thereof within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

The indorsement shall be written or printed in the following form :—

"The plaintiff claims — for debt, and — for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

The second rule
of Hil. T. 1832,
above referred
to, viz. as to
indorsement of
claim for debt
and costs.

the following Hilary term another general rule, relating to the returning of process, was assented to by all the fifteen judges, and which will be stated near the conclusion of this chapter. (n) The principal and most extensive rule under this statute was the tenth rule of Michaelmas term, 3 W. 4, (o) which declares, "that if the plaintiff or his attorney shall *omit* to insert in or "indorse on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ shall not on that account be held "void, but may be set aside as *irregular* upon application to "be made to the Court out of which the same shall issue, or "to any judge." The full operation of this rule will be hereafter

And that the alias and pluries writ of capias shall be in the following form:—

William the Fourth, &c.

To the sheriff of ———.

We command you as heretofore we have commanded the sheriff of ———, that you omit not, &c. [as in the writ of capias No. 4 in the schedule of the said act.]

8. It is further ordered, That in every writ of *distringas* issued under the authority of the said act, a non omittas clause may be introduced by the plaintiff, without the payment of any additional fee on that account.

9. It is further ordered, That when the attorney actually suing out any writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

10. It is further ordered, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as *irregular* upon application to be made to the Court out of which the same shall issue, or to any judge.

11. It is further ordered, That upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected, and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the defendant or defendants, who shall have been arrested and shall not have perfected special bail.

12. It is further ordered, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the tenth day of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the twenty-fourth day of October, as if the declaration or preceding pleading had been delivered or filed on the twenty-fourth day of October, but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

13. It is further ordered, That in case a judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of *capias* ad satisfaciendum, fieri facias, or elegit, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime.

14. It is further ordered, That if any attorney shall, as required by the said act, declare that any writ of summons, or writ of *capias*, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

(n) Rule of Hilary term, 3 W. 4, (o) See the rule 10, *supra*, 161, in note.
A.D. 1833, *post*.

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fully considered; but it may be proper here to observe that the *judges* have not by this rule *increased* the facility of trifling motions to set aside proceedings for irregularity; but have rather limited and narrowed the consequences of nonobservance of the enactments, by declaring that the process shall not on that account be deemed *void*, as perhaps might otherwise have been the construction.

The *general* operation of 2 W. 4, c. 39, and rules thereon, over all or most of the writs, proposed to be considered in this chapter.

The uniformity of process act, 2 W. 4, c. 39, and the rules thereon, (p) it will be observed, contain enactments and regulations, many of which are in *pari materia* and of a *general nature, equally affecting all or many of the five forms of writs*. It is therefore considered to be most expedient in this chapter to take a general and comparative view of all the *principal requisites* which more or less affect *all* the writs and proceedings thereon, examining in the natural order as they occur all the parts of each *writ*, with the *memoranda* and *indorsements*, and decisions thereon, and the consequences of deviation from the prescribed forms; and then after having thus disposed of the *principal* and most *general rules* in distinct paragraphs, we will *separately* consider the writs of *summons*, *distringas*, *capias* and *detainer*, process to *outlawry*, and *process and entries* to prevent a *statute of limitations* from becoming a bar.

6. Examination of the *parts* and *general requisites* of all the five writs under the uniformity act, 2 W. 4, c. 39.

6. We are now to consider the *parts* and *general requisites* of all the writs to be issued in pursuance of the uniformity of process act, 2 W. 4, c. 39, and of the rules thereon; and it is proposed to examine them in the order in which they occur in each writ, and then the indorsement thereon, and under the following heads. Forms of all the writs, as prescribed in the schedule, (q) may in general be obtained from any law stationer, ready printed with blank spaces, in which the name and residence of the defendant, the name of the plaintiff, the form of action, teste, or date, and other varying facts, are to be inserted in the attorney's office. The principal writ is usually on parchment, and as many copies as there are defendants are to be made and are usually on printed paper. The use of these *printed forms* tends to secure accuracy, at least in the printed parts. But when the names and residences of

(p) See the rules, *ante*, 160, 161, in note.

(q) Commencing *ante*, 154, and ending *ante*, 156.

very numerous plaintiffs or defendants would occupy more room than is found in the common printed forms, then it is usual to frame the whole of the writ and copies in manuscript.

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ANALYTICAL TABLE OF THE PARTS OF THE SEVERAL WRITS AND PROCEEDINGS THEREON, CONSIDERED IN THIS CHAPTER.

First, Name of the king.

Second, Direction to the defendant.

Third, Statement of christian and surname of defendant or defendants.

Consequences of mistakes.

The like in continued process.

Fourth, Statement of defendant's residence.

Consequences of mistakes.

The like in continued process.

Fifth, Defendant's addition of degree.

Sixth, Character in which the defendant is sued, or plaintiff sues.

Seventh, Names of all the defendants to be inserted, and no more.

Eighth, Direction to sheriff or other officer by whom distringas, capias, or detainer to be executed.

Forms of directions to sheriff's, &c.

Ninth, Non-omittas clause in distringas or capias.

Tenth, Statement of what defendant or sheriff is required to do.

Eleventh, Time in which defendant to appear, &c. and of return-days.

Twelfth, Returnable in what Court.

Thirteenth, Description of form of action.

Fourteenth, Name of plaintiff and character in which he sues.

Subsequent repetition of his christian and surname.

Character in which plaintiff sues.

Fifteenth, Notice to defendant of consequences of his non-compliance or not putting in bail above.

Sixteenth, Teste in name of Chief Justice or Chief Baron.

Seventeenth, Teste or date of day of issuing writ.

Is the commencement of action.

Eighteenth, Memoranda, notice, and warnings at bottom of writ.

Nineteenth, Indorsements on writs.

1. Sum sworn to on bailable process.

Directions not to arrest a particular defendant.

2. Name and place of abode of plaintiff's attorney and agent.

3. Of name and place of residence of plaintiff when suing in person.

4. Of amount of debt and costs claimed.

5. Of defendant's abode, addition, or description on bailable process,

whether or not necessary.

6. Of day of serving writ or arresting defendant.

Twentieth, Of concurrent writs into different counties.

Twenty-first, Of alias and pluries writs of summons and capias.

Twenty-second, Of supposed necessity for second affidavit of debt, &c.

Twenty-third, Of the præcipe for every writ.

Twenty-fourth, By what officer writ to be signed.

Twenty-fifth, By what officer writ to be sealed.

Twenty-sixth, Practical proceedings on issuing any writ.

Twenty-seventh, Consequences of non-observance of requisites in mesne process, and copies thereof.

Twenty-eighth, Of amending and re-sealing before execution.

Twenty-ninth, Amendments of writs and copies, when refused.

No distinction between writ and copy.

Thirtieth, Of motions and summons for irregularities.

Thirty-first, Of preparing to serve or execute writ.

Thirty-second, Of the execution of writs in general.

1. Delivery to attorney or sheriff, or officer.

2. Attorney's undertaking to appear.

3. Duration of writs.

4. Place where to be executed.

5. Preparing to serve or execute.

6. Mode of service or execution, and delivery of copy of writ.

Thirty-third, Indorsement on writs of, time when executed.

Thirty-fourth, Affidavits of the execution of process.

Thirty-fifth, Returns to process.

1. Who to return same.

2. How to enforce returns.

3. Forms of returns.

Thirty-sixth, Summary of circumstances to be attended to by a defendant after execution of process in general.

Thirty-seventh, His ascertaining the attorney's authority to sue.

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THE PARTS OF WRITS AND MEMORANDA CONSIDERED.

*First, Name of
the king.*

First, William the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith. (r) *To C. D. &c. [or to the sheriff, &c.]* The uniformity of process act, 2 W. 4, c. 39, by *all the forms* prescribed in the schedule, (r) requires *every writ to commence* with the name and style of the *king* for the time being, a form very anciently adopted, because the king was always considered the fountain, or less figuratively, the dispenser of justice, (s) and who by every process issuing from or returnable in his Courts *commands* justice to be rendered, and this formula is peculiarly well calculated to induce respect and observance. Before this act it was held that where a writ of *capias ad satisfaciendum* by mistake commenced in the name of the then recently *deceased* king, instead of his *then successor*, but the sheriff had obeyed it by taking the defendant, the mistake did not constitute a material variance or any defence in an action against the sheriff for the escape; provided, as the fact was, that the writ was at its conclusion tested in the name of the then Chief Justice. (t) We shall presently see the importance of the latter being accurately inserted at the *conclusion* of the writ, as expressly required by 2 W. 4, c. 39, s. 12.

Secondly, Direction to the defendant or defendants, &c.

Secondly, To C. D. of —, in the County of —, greeting, (u) or “*To the Sheriff of —, greeting.*” A writ of *summons* must be directed or addressed to the *defendant*, without the intervention of any public officer, and command him, within eight days after the service of the writ, inclusive of the day of such service, to cause his appearance to be entered in the named Court, and informs him of some of the consequences of his neglect, viz. that the plaintiff *may* cause an appearance to be entered for him and proceed thereon to judgment and execution. The other writs are addressed to the *sheriff* or *other proper officer*, and *command* him, according to the distinct object of each writ, either to *distrain* upon the *goods* of the defendant for forty shillings, or to *take* and keep him, or if he be already in custody to *detain* him; and hence these several processes are, according to their *principal* purport and

(r) See the several forms, *ante*, 154, 155, 156, in the note.

(s) 1 Bla. Com. 266; 3 Bla. Com. 273; and see forms, *id.* *Appendix*.

(t) *Elvin v. Drummond*, 4 Bing. 273; 12 Moore, 523, S. C.

(u) *Ante*, 154, in the note.

object, termed writs of *summons*, or of *distringas*, or of *capias*, or *detainer*. A writ of *summons* is to be directed to the defendant by his *christian and surname*, as may be collected from the initials C. D. in the prescribed form in schedule No. 1. It will be observed that all the forms are printed in the singular number, and it follows that when there are *several* parties, whether as plaintiffs or defendants, the form must vary accordingly, but with the like precision as to every additional party; but where the names of several defendants have been stated in the writ, the subsequent word, *you*, is to be taken distributively, and it is not necessary to say, "you and each and every of you, &c." (u) The defendant is, by section 1, to be described at all events in a *writ of summons* "of the place of his residence or *supposed residence* or of the place and county where he is *supposed to be*;" and if it be afterwards ascertained that he is to be found in another county and not within two hundred yards of the border of the former, then, before such writ has been served, it may be *altered*, and his description be made of the latter county; but then, after such alteration, the writ must be *re-scaled* before it can be served, or it may be set aside for irregularity; (v) or, as may be advisable, *concurrent* and similar original writs of summons may be issued into the other county or counties. (x)

Thirdly, The christian and surname of the defendant or defendants. The forms prescribed in the schedule of 2 W. 4, c. 39, whether addressed to the defendant or to a sheriff or other officer, alike require that the full and exact *christian and surname* of the defendant be stated in *every writ* and also in *every copy thereof*, in full; and it is only in cases provided for by 3 & 4 W. 4, c. 42, s. 12, and the 32d general rule of Hil. Term, 2 W. 4, that any deviation is expressly allowed. That statute, in section 12, enacts "that in all actions upon bills of exchange, promissory notes, and other *written instruments*, any of the parties to which are designated by the *initial* letter or letters, or some *contraction* of the *christian* or *first* name or names, it shall be sufficient in every affidavit to hold to bail, and in the process and declaration, to designate such persons by the *same initial letter or letters*, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full; and the 32d general rule of Hil. Term, 2 W. 4, orders "that where the defendant is de-

*Thirdly, State-
ment of christian
and surname of
defendant or
defendants, and
consequences of
mistake.* (y)

(u) *Engleheart v. Eyre and another*, 2 Dowl. 145; post, 183.

(x) See post, as to concurrent writs.

(v) *Liziers v. Sanson*, 3 Moore & Scott, 194; 2 Dowl. 745, S. C.

(y) See the law before 2 W. 4, c. 39, Chitty on Pleading, 5th edit. 279 to 285.

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scribed in the process or affidavit to *hold to bail* (z) by *initials* or by a *wrong name*, or *without a christian name*, the defendant shall not be discharged out of custody or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that *due diligence* has been used to obtain knowledge of the proper name, (a) and it is not essential to perfect such due diligence to inquire of the defendant or his friends or at his house, especially if he be a foreigner, because that inquiry might induce his avoidance of process; but it suffices to make the inquiry from *other* different people likely to know the full name. (a) It should seem, therefore, that after applying by letter or otherwise to an intended defendant, or inquiring of his neighbours, or even of other parties likely to give information, as in the case of a bill to the other parties to the same, for the particulars of his full christian and surname, or any other unsuccessful inquiries of several persons likely to be able to give the requisite information, even his surname, with or without any other description, might safely be used, at least in an affidavit to hold to bail and in a *capias*. (b)

(z) It is supposed that from the terms of this rule it only applies to *hailable* process, and not to a writ of summons; see 1 Archbold's Pr. K. B. 512, note (c); and perhaps no rule was necessary as regarded *serviceable* process, because the Court would not set it aside on account of a misnomer or *initial*, or omission of chris-

tian name, *id.* 513, *sed quare*, for the statute and the prescribed forms require the *full name* in general to be stated, and the rule Mich. T. 1832 declares *any omission* to be an irregularity.

(a) Rule Hil. T. 2 W. 4, c. 32; see what is due diligence, *Hicks v. Marreco*, 3 Tyr. 216; 1 Crompt. & Mee. 84, S. C.

(b) See form of affidavit to oppose a rule for setting aside proceedings, *infra*, in note. This alters the practice stated in Tidd, 9th edit. 148, 301, 448. The *affidavit*, to satisfy the Court that due diligence had been used to obtain the defendant's proper name before issuing process in answer to any rule for setting the same aside, must of course fully state the facts; and according to *Hicks v. Marreco*, 3 Tyr. 216, S. C.; 1 Crompt. & Mee. 84, it seems expedient to state the names and address and answers of the several persons to whom application for information has been made, and especially the reasons why information could not be obtained from the directory, public offices, &c. The following affidavit was made in a late case:—

"A. B., of, &c. maketh oath and saith, that this action hath been commenced and is intended to be prosecuted against the said defendant on a bill of exchange accepted by him by and in the initials of his christian name, thus, [giving an exact copy of the signature,] and that before the making of the affidavit of debt in this action, and also before the issuing of any writ thereon, this deponent, as well by letter as in person, applied to the said defendant and requested him to state his full christian and surname, and this deponent at the same time stated to the said defendant that he made such request on purpose and with the intent to state his name correctly in the affidavit and process about to be made and issued against him; but the said defendant *refused* to give this deponent any information respecting the same, and said to this deponent 'I will be candid to this extent, I am lineally descended from Adam and was born since the flood, the rest of my name and pedigree you may discover how you can,' [or 'and the said defendant wholly omitted and refused to give this deponent any further or other answer to such application or request.'] And this deponent further saith, that before issuing any process in this action he also made diligent inquiry as to the proper christian and surname of the said defendant, as well of several innuates at the house where the said defendant then resided, as also of several of the neighbours of the said

Form of affidavit to account for plaintiff's suing defendant by initial or wrong name.

It seems proper in general to examine the directory, and according to circumstances to inquire for the full name at the post-office and of the collector of poor-rates and taxes, and at public offices, if the intended defendant be connected with any, before making the affidavit to hold to bail, and in an affidavit to state the result *in answer* to any rule nisi for setting aside the proceeding. (c) But the very terms of this rule of Hil. T. 2 W. 4, appear to imply that unless *due diligence* has been used to obtain knowledge of the proper name, and the defendant in *bailable* process has in the affidavit to hold to bail or process been described by initials or a wrong name, or without a christian name, he might be discharged out of custody or the bail-bond delivered up to be cancelled on motion.

When a person has *signed* or executed a bond or deed by a wrong name, the writ and declaration should be against him by *that* name, and it would not be correct to issue a writ or declare against him by his real name, with an averment that he executed the instrument by the false name; (d) and it is safer to issue the writ, and declare against an obligor by the exact name in which he *subscribed* and executed the bond or deed, although different from that in *the body*. (e)

The above rule of Hil. T. 1832, in its terms, appears to apply only to *bailable* process, and not to extend to a writ of summons or serviceable process. Before the modern enactments, it was decided that a serviceable bill of Middlesex, and

defendant, and particularly of, &c. (naming the persons and addition,) and also of the drawer of the said bill, but this deponent could not nor can he now obtain any information whatsoever respecting the full christian or first name of the said defendant, &c." [State any material circumstances according to the facts.]

(c) *Hicks v. Marreco*, 3 Tyr. 216; 1 Crom. & M. 84, S. C.; and see cases as to notice of the dishonour of a bill, Chitty on Bills, 8th edit. 506.

(d) *Gould v. Barnes*, 3 Taunt. 504; *Mayelstone v. Lord Palmerston*, 2 Car. & P. 474; *Bonner v. Wilkinson*, 5 Bar. & Ald. 682.

(e) *Mayelstone v. Lord Palmerston*, 2 Car. & P. 474; 1 Moo. & M. 6, S. C.; Chitty on Pleading, 4th edit. vol. ii. 436 a, note (c), *sed quare*, *id. ibid.* If process has been issued against a person by a wrong name, the proper course in a declaration or other pleading is to continue the same name, and it is not correct to describe it as might have been *intended*, although the proper name. Thus, where it was alleged that by a writ of latitat the sheriff was commanded to take one E. J., (the real name,) by the name of J. J., (the erroneous name in the writ,) and an

examined copy of the latitat was given in evidence commanding the sheriff to take J. J., and the bail-bond was signed by the principal, thus, "E. J., arrested by the name of J. J.," and the plaintiff offered to prove that this person was their debtor whom they *intended* to hold to bail, Lord Ellenborough said, "The writ must speak for itself; I cannot hear that instead of A. B. mentioned in the writ, it was *meant* that the sheriff should arrest X. Y.," and the plaintiff was nonsuited, *Scandover v. Warne*, 2 Campb. 270; *Wilks v. Lock*, 2 Taunt. 399; 1 Dowl. & Ry. 551; *Amery v. Long*, 1 Campb. 14; *Brown v. Jacobs*, 2 Esp. Rep. 726. The proper course in a declaration on a bail-bond, or for an escape, extortion, &c. is to describe the name precisely as in the writ, without more, and then to aver that under colour or virtue of that writ the party, stating his real name, was arrested, &c. *id. ibid.*

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subscribed notice, describing the defendant as Mr. A., without stating his Christian name, was irregular; (*f*) but in another case, where the defendant's Christian name was *omitted* in serviceable process, the Court of King's Bench refused to set the same aside for irregularity, and left the defendant to plead in abatement, because it might be possible that a party has no Christian or first name. (*g*) But in another case the *omission* of the Christian name was holden an irregularity. (*h*) Upon the whole, the safest course in serviceable process is to insert *some even supposed Christian or first* name, as well as the surname, in the process, and leave the defendant to apply by summons under the 3 & 4 W. 4, c. 42, s. 11, to compel the plaintiff to amend his declaration; for the 11th section of that act abolishes all pleas in abatement of *misnomer*; and if a full Christian and surname be inserted in serviceable process, although it be mistaken, no advantage can be taken unless the misnomer be *continued* in the declaration, and then only by summons under the 11th section above noticed; or it may be advisable to issue the writ against the defendant, describing him by an *alias dictus* of several names, as John Nokes, *otherwise called* James Nokes, *otherwise called* Joseph Nokes, which is permitted even in an indictment. (*i*)

When there are *two persons of the same names*, or nearly so, it may be of essential importance to describe the proper party in the writ and copy, and instruct the party who is to serve the same with more particularity than merely stating the name, and to be careful that *that* party be served, and to be prepared on the trial to prove, even by more than one witness, the identity of the person so served with the person who actually owes the debt or committed the injury; for if by accident a wrong person should be served, and appear and defend throughout the action, then unless the plaintiff can clearly prove collusion between that party and the person who was intended to be sued, and that the latter had full intimation of the writ and interfered with the defence, the plaintiff might be nonsuited. (*k*)

(*f*) ——— *v. Snow*, Tidd, 9th edit. 148; *Tomlin v. Preston*, 1 Chit. Rep. 398; *Kingston v. Jewellyn*, 4 Moore, 317; 1 Brod. & B. 529, S. C.

(*g*) *Rolph v. Peckham*, 6 Bar. & Cres. 165.

(*h*) *Tomlin v. Preston*, 1 Chit. Rep. 397; Tidd, 148; *post*, 170, n. (*u*).

(*i*) 1 Chitty on Pleading, 5 edit. 277, 281; 1 Chitty's Criminal Law, &c.

(*k*) *Wilde v. Keep*, 6 Car. & P. 235. Frequent attempts to nonsuit on this ground, especially when two brothers have been much alike, occur. In a late

case of an action by a surgeon for his professional charges in setting a leg, it singularly happened that the real party's brother had his leg broken about the same time, and was attended by another surgeon who had been paid, and by mistake the latter brother was served with the process, and had it not been for the proof that the *real* party had in writing instructed his attorney to appear, and that his *left* leg had been broken, and that the plaintiff set a *left* leg, whereas the other brother's right leg was set, the plaintiff would have been nonsuited.

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Name of a Corporation.

In a writ against a *Corporation aggregate*, the *correct corporate name* should be accurately stated, or the same consequence would ensue as in the misnomer of a private individual, viz. a summons to compel the plaintiff to amend his declaration. (k) Thus, the *Corporation* of London should be described as "The mayor, commonalty, and citizens of the city of London." But unless the name of the corporation be so entirely misdescribed as to render it questionable to what corporation it relates, a mistake would not be ground of *nonsuit*, but must have been pleaded in abatement; (l) and since the 3 & 4 W. 4, c. 42, s. 11, the only mode of taking advantage of the mistake would be by affidavit of the correct name and summons, to have the declaration amended accordingly at the cost of the plaintiff. But when there has been a mistake in a political or corporate name, it is considered most prudent to amend, and which will be allowed when the statute of limitations would prejudice, (m) or to issue a fresh writ.

In a writ against *Hundredors*, as on the 7 & 8 G. 4, c. 31, for the felonious demolishing or beginning to demolish a dwelling-house, it has been usual in the writ to describe them as "The *men* inhabiting within the hundred of ———— (n) [or "borough," or "wapentake and division," according to the facts] in the county of ————." But it would perhaps be better to follow the words of that act, and therefore to describe them as "The *inhabitants of the hundred of* ————, in the county of ————," especially as *women* as well as men are liable; (o) and if the writ be issued against only two of the inhabitants by name, it would be irregular, and could not be proceeded upon. (p) The proper name of the district must be carefully observed, for if a mistake should be continued in the declaration, it was holden to be fatal even in arrest of judgment. (q) But probably since the 3 & 4 W. 4, c. 42, s. 11, the defendant ought to apply upon affidavit to have the declaration amended, unless the political name and character of the corporation be so totally dissimilar as to mislead. A writ may be

(k) Com. Dig. Pleader, 2 B. 1; 2 Inst. 569; *Horton v. Inhabitants of Stamford*, 1 Cromp. & M. 773; 2 Dowl. P. C. 96.

(l) *Stafford v. Bolton*, 1 Bos. & Pul. 40; *Croydon Hospital v. Farley*, 6 Taunt. 467; 2 Marsh. 174, S. C.; *Attorney-General v. Rye*, 7 Taunt. 546; 1 Moore, 267, S. C.; and see *Carlisle v. Blamire*, 8 East, 487.

(m) *Horton v. Inhabitants of Stamford*, 1 Cromp. & M. 773.

(n) Tidd's Supp. A. D. 1833, p. 262, note (a).

(o) 2 Saund. 374; Chit. Col. Stat. 569; *Horton v. Inhabitants of Stamford*, 1 Cromp. & M. 773; 2 Dowl. P. C. 96. The service of a writ upon a hundred or other like district, is to be on the high constable thereof, or any one of such high constables, 2 W. 4, c. 39, s. 13.

(p) *Jackson v. Pearson*, 1 Bar. & Cres. 304; 2 Dowl. & Ry. 439.

(q) See *Jackson v. Pearson*, 1 Bar. & Cres. 304; 2 Dowl. & Ry. 439, S. C.; 2 Saund. 376 f; and yet why should it not be considered as only in abatement, as in the case of a corporation, *supra*, n. (l).

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against "*The inhabitants of a county,*" or "*of a city,*" or "*town,*" or the inhabitants of a franchise, liberty, city, town, or place, not being part of a hundred, or other like district, when the law has imposed liability on such a district, but not otherwise,^(r) and in that case the writ is to be served on any peace officer thereof.^(s)

Consequences
of omission and
mistakes in
name of a de-
fendant.

As *all* the forms prescribed by the act require the *full Christian and surname* of the *defendant* to be inserted in every writ, and also in the copy to be served, and as the rule Mich. Term 3 W. 4, declares *all omissions* to be irregularities, it would seem that, unless in the excepted cases mentioned in the foregoing rule of Hilary Term, 2 W. 4, r. 32, and in 3 & 4 W. 4, c. 42, s. 12, if a plaintiff, without having used due diligence to ascertain the correct Christian and Surname, should insert merely an *initial* or should leave a blank for or *omit* a Christian or first name, and still more *omit any Surname*, a *bailable* writ might be set aside for irregularity. ^(t) And a similar *blank* for or *omission* of the defendant's Christian name even in *serviceable* process, would still under the act be deemed an irregularity, as it was before that act in *serviceable* process; ^(u) although, before the uniformity of process act, the Court always refused to set aside *serviceable* process on account of a mere *misnomer*, i. e. a *mis-*
take in the name, ^(x) and would no doubt do so still. ^(y) The 3 & 4 W. 4, c. 42, s. 11, enacts, "that no plea in abatement for a *misnomer* shall be allowed in any *personal* action; but that in all cases in which a *misnomer* would, but for that act, have been pleadable in abatement in such action, the defendant shall be at liberty to cause the declaration to be amended at the *costs* of the plaintiff, by inserting the right name upon a judge's *summons*, founded on an *affidavit* of the right name; if, however, such a *summons* should be discharged, then the *costs* of such application are to be paid by the party applying, if the judge shall think fit." ^(z)

(r) 2 T. R. 667; 11 East, 347, 375.

(s) 2 W. 4, c. 39, s. 13.

(t) *Semble*, and see Archbold's, K. B. 4 ed. 513, note.

(u) *Tomlins v. Preston*, 1 Chitty's Rep. 397; Tidd, 9 ed. 148; *ante*, 168, n. (h).

(x) *Serjeant v. Gordon*, 7 Dowl. & Ry. 258; *Rolph v. Peckam*, 6 Bar. & Cres. 164; 9 Dowl. & Ry. 214; *Sumner v. Batson*, 11 Moore, 39.

(y) *Semble*, *id. ibid.* The principle of those decisions no doubt still continues, and the statute 3 & 4 W. 4, c. 42, s. 11,

implies that unless a *misnomer* be carried into and continued by the *declaration*, no objection can be taken by the defendant; but so *defective* a description as a total *omission* seems not to be within that enactment.

(z) *Semble*, that before the *summons* be obtained, the defendant ought to be required to request the plaintiff, or his attorney, to frame or alter his declaration into the proper name, or ought not to be allowed the *costs* of the application.

A defendant is thus enabled in all cases, by summons, to prevent the *continuance* of his misnomer on the record, and even may compel the plaintiff to pay the *costs* of the application, although previously no costs were recoverable on a plea in abatement, unless an issue in fact were joined thereon.

In case of *bailable process*, it was the practice, (a) before the 2 W. 4, c. 39, in case the defendant was described by a wrong Christian or surname, not *idem sonans*, (b) and his affidavit of the misnomer was unanswered by an affidavit shewing that the defendant was known as well by one name as the other, or had allowed himself to be so called, (c) for the Court or a judge, on motion or summons, to discharge the defendant out of custody, or order the bail bond to be cancelled, on the ground that the arrest was illegal. (d) And the sheriff and his officers, and all persons concerned in the arrest, although they took the proper person, were liable, on account of the misnomer, to an action for the illegal imprisonment. (e) But if *idem sonans*, or a variance so trifling as not to mislead, as Reynall for Reynolds, or Tither Leigh for Tythe Leigh, although there was in fact a variance, the Court would not interfere to discharge the defendant. (f) And as respects serviceable process, where the defendant had been served with a copy of a writ of summons, described as Andrew Bryon instead of Andrews Bryan in the writ, the variance was holden not to be a sufficient irregularity to induce the Court to interfere. (g) And it has been suggested, that since the 3 & 4 W. 4, c. 42, s. 11, takes away every plea in abatement of misnomer, and supplies in lieu a summary remedy to compel the plaintiff to correct the name in his declaration, and that as the relief on motion was

(a) It will be observed that by the 32d rule of Hil. T. 2 W. 4, that practice is adverted to and altered pro tanto.

(b) *Webb v. Lawrence*, 1 Croup, & M. 506, calling defendant Lawrence instead of Lawrance, was considered no misnomer.

(c) As in *Weston v. Maxwell*, 2 Tyr. 278; 2 Crom. & J. 215, S. C.

(d) *Reynolds v. Hankin*, 4 Bar. & Ald. 536; *Smith v. Innes*, 4 Maule & Selw. 360; *Parker v. Bent*, 2 Dowl. & R. 73; *M'Beath v. Chatterley*, id. 237; *Wilks v. Lorch*, 2 Taunt. 399. If, however, a defendant put in bail and defended the action, and judgment was in other respects regularly signed against him by the wrong name, it was always considered that he might be taken in execution by the wrong name. *Crawford v.*

Satchwell, 2 Stra. 1218.

(e) *Cole v. Hindson*, 6 Term R. 234; *Shadyett v. Clipson*, 8 East, 328. A plea of justification by an officer (to trespass for taking the goods of A. B.) that he took them under a distringas against C. D. (meaning the said A. B.) to compel an appearance, with an averment that A. B. and C. D. are the same persons, cannot be supported, unless A. B. appeared in that action, and did not plead the misnomer in abatement; if he did appear in that action, and omitted to plead in abatement, he was concluded by it. *Cole v. Hindson*, 6 Term R. 234.

(f) — *v. Reynall*, 1 Chit. R. 659; *R. v. Culbert*, 2 Crom. & M. 189; *Shaw v. Tytherleigh*, 6 Price, 2.

(g) *Tyser v. Bryan*, 2 Dowl. 640.

only in lieu of a plea in abatement now thus abolished, the *Court probably would* not now interfere on *motion* on account of *misnomer*. (*h*) At all events, if it be made the subject of a motion for giving up a bail-bond to be cancelled, that the defendant was arrested by a wrong name, the affidavit should be entitled in the defendant's *right* name, "sued by the name of," the wrong name. (*i*) And in a late case, where the defendant swore that his name was *Winchcombe Henry Saville Hartley*, and he was named in the *capias* *William Saville Hartley*, Mr. Justice Williams, on 12th January, 1835, refused to discharge him out of custody on account of misnomer.

It has been decided, that if aailable *capias*, or *latitat*, or *distingas*, be issued against a defendant by a wrong name, and his person or goods taken, he might support an action of trespass against the sheriff and his officers, or the plaintiff or his attorney, if the latter actually interfered; (*k*) and therefore it was decided, that if the sheriff or his officer discover that the defendant is described in a *capias* or other process by a wrong name, he is not bound to execute it, because he might thereby subject himself to an action. (*l*) But if the misnomer be merely in a *letter* in a surname, not materially altering the *sound*, as *Lawrance* instead of *Lawrence*, (which are considered *idem sonans*), or in such other trifling respects as we have just mentioned, (*m*) then the Court would not interfere. (*n*) And where the defendant was arrested as *William Henry Maxwell*, the Court refused to discharge him on common bail on his affidavit that his real name was *William Hamilton Maxwell*, the plaintiff swearing in answer that the defendant was known to him for five years by the name of *William Henry*, and had told him that was his name, and had signed an agreement with other parties in which he was described as *William Henry*; thus, *W. H. Maxwell*. (*o*) It is

(*h*) *Cullum v. Leeson*, 4 Tyr. 266; 2 Crompt. & Mees. 406, S. C.; 1 Arch. Pr. C. P. [39]. But see a reported case of a *motion* subsequent to that case, *Finch v. Cocker*, 2 Crompt. & Mees. 412; and 4 Tyr. 285, S. C. In 1 Arch. Pr. C. P. [39], it is thus suggested, "A mistake in the name of the defendant, in the writ and affidavit, however, is not perhaps so material now as formerly, for as misnomer now cannot be pleaded in abatement, the Court *probably* would not interfere in such a case upon *motion*." But, still in these cases the writ must correspond with the *affidavit* to hold to bail, and you cannot describe the defendant in one way in the affidavit and in

another in the writ,

(*i*) *Finch v. Cocker*, 4 Tyr. 285.

(*k*) *Cole v. Hindson*, 6 T. R. 234; ante, 171, note (*e*); *Shadyelt v. Clipson*, 8 East, 328. And after an action of trespass had been commenced by a defendant on account of such misnomer, the Court of K. B. before the 2 W. 4, c. 39, refused permission to amend the process. *Anon. Mich. T.* 41 G. 3, K. B.; Tidd, 9 ed. 161, note (*n*).

(*l*) *Morgan v. Bridges*, 1 Bar. & Ald. 647.

(*m*) Ante, 171.

(*n*) *Webb v. Lawrence*, 1 Crompt. & M. 806.

(*o*) *Weston v. Maxwell*, 2 Tyr. 278.

to be hoped that ere long, when the proper intended party or his goods have been taken under process in which his name has been mistaken, he will, by express enactment, be deprived of the power of sustaining an action on any such vexatious ground.

Before the 2 W. 4, c. 39, in the case of misnomer, if the defendant appeared by the wrong name by which he was sued, the plaintiff was to declare against him by that name; and if he appeared by his right name, the plaintiff might declare against him thereby, stating in the declaration that the defendant had been *served* with process or *arrested* by the wrong name. (*p*) But if the defendant did not appear, the plaintiff could not appear for him in his right name according to the statute; (*q*) nor could he appear for him in the name by which he was sued, and afterwards declare against him in his right name. (*r*) His only course in such case was, and still seems to be, to appear for the defendant in the wrong name by which he was described in the writ, and also to declare against him by the same name, which would only subject him to being compelled, by the judge's order above-mentioned, to amend the declaration by inserting the right name at his costs of the summons and order. (*s*)

Formerly the Court allowed the amendment of a writ in the name of a defendant, as by allowing the *insertion* of his christian name, omitted by mistake, (*u*) and this even in proceedings against a prisoner. (*x*) But since the uniformity of process act, 2 W. 4, c. 39, this will not in general be permitted, unless in cases where the statute of limitations would constitute a bar, (*y*) or unless the action has proceeded to the eve of trial, or to a considerable length, in which event amendments in the names and number of parties has been permitted, even in cases where the statute of limitations could not apply. (*z*)

Amendments of names or number of defendants when refused. (*t*)

(*p*) *Doe v. Butcher*, 3 T. R. 611; *Dring v. Dickenson*, 11 East, 225.

(*q*) *Doe v. Butcher*, 3 T. R. 611; *Greenslade v. Rathorne*, 2 N. R. 132; *Dring v. Dickenson*, 11 East, 225.

(*r*) *Dring v. Dickenson*, 11 East, 225; *Delavoy v. Cannon*, 10 East, 328; *Mestaer v. Hertz*, 3 M. & S. 45.

(*s*) *Ante*, 170, n. (*z*); 1 Archbold, 4 ed. 514, and see *Smith v. Patten*, 6 Taunt. 115; 1 Marsh. 474, S. C.; *Reeves v. Slater*, 7 B. & C. 486; 1 M. & R. 265, S. C.;

Oakley v. Giles, 3 East, 167; *Cole v. Hindson*, 6 T. R. 234, 236; *Crawford v. Satchwell*, 2 Stra. 1218.

(*t*) See *post* further as to the amendments of writs.

(*u*) *Rutherford v. Mein*, 2 Smith, 392.

(*x*) *Carr v. Shaw*, 7 T. R. 299.

(*y*) *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564; *Lakin v. Watson*, 2 Dowl. P. C. 633; *Horton v. Borough of Stamford*, 2 Dowl. P. C. 96.

(*z*) *Post*, 174, n. (*f*).

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Names in con-
tinued process.

Every *continued writ*, as an *alias* or *pluries*, summons or *capias*, should precisely accord with the preceding process in the *names of the parties*, and if a writ of *capias* be against a defendant by one christian name, and the *alias* or *pluries* by a different christian name, it has long been the practice for the Courts to set aside the latter. (a)

Formerly, also, the Courts afforded more facility than at present in *amending* a writ by either inserting *the name of an additional defendant* or *striking out the name of one improperly named*; (b) but of late the Court have refused to allow such an amendment, and compelled the plaintiff to begin *de novo*, (c) unless in cases where if the plaintiff were put to a new action, the statute of limitations might constitute a bar, (d) in which case an amendment has been permitted, as substituting "borough" for "hundred" in an action upon the 7 & 8 G. 4, c. 31, (e) or except in cases where the proceedings in the cause have proceeded much beyond mere process, as until the eve of trial, when such an amendment has been permitted; (f) and even so early in the proceedings as after the plaintiff has declared, the Court allowed the name of the official assignee of a bankrupt to be introduced into the declaration, although he had not been named in any writ or prior proceeding. (g)

Fourthly, State-
ment of defend-
ant's Residence
and conse-
quences of mis-
take.

Fourthly, Description of defendant's Residence. Before the recent enactment no description of *residence* was required in any process excepting in proceedings by original writ to outlawry, when the statute of additions, 1 Hen. 5, c. 5, required original writs and indictments to state the addition of the defendant's *estate or degree* or *mystery*, and of the towns or hamlets, or places *and counties* of which they were or be, or in which they be or were conversant. (h) When it is considered that in general, as well in executing serviceable asailable process, the plaintiff or his attorney usually takes care in various particulars sufficiently to identify the proper party, it should seem

(a) *Corbet v. Bates*, 3 T. R. 600; and see further, Tidd, 9th ed. 148.

(b) *Carr v. Shaw*, 7 T. R. 299; *Fox v. Clifton*, 1 Chitty's Pl. 5th ed. 14, n. (e); *Baker v. Neave*, 1 Crom. & M. 112; 1 Dowl. P. C. 618, S. C.; *Tabram v. Tenant*, 1 B. & Pul. 481; *Binns v. Pratt*, 1 Chit. R. 369.

(c) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; *Lakin v. Watson*, 2 Dowl. P. C. 633.

(d) *Id. ibid.*; *Horton v. Borough of Stamford*, 2 Dowl. 96.

(e) *Horton v. Stamford*, 2 Dowl. 96.

(f) *Fox v. Clifton*, C. P. November, 1829; 1 Chitty's Pleading, 5th ed. 14, note (e). In that case an order was made just before the trial that some of the defendant's names should be struck out.

(g) *Baker v. Neave*, 3 Tyr. 233.

(h) See construction of that act in *Gray v. Sidneff*, 3 Bos. & P. 395.

that it can rarely occur that there will be much occasion for or utility of particularity in the writ in this respect. The 2 W. 4, c. 39, s. 1, however, expressly requires that "in every writ of summons and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or supposed to be, shall be mentioned," and the prescribed words in the form of such writ of summons, in the schd. No. 1, is thus, "*C. D. of, &c. in the county of —.*" But the 4th section merely prescribes that the form of *capias* shall be as in the form No. 4 of the schedule, and which, without in terms naming the county, leaves a blank, as thus, "*C. D. of —, if he shall be found, &c.;*" thus leaving it uncertain what description of residence should be inserted in the latter blank. It will be observed also that in the schedule and in the rule M. T. 3 W. 4, the like uncertainty is continued. In a very recent case the judges of the Court of Common Pleas were equally divided in opinion whether it was necessary to insert in a *capias* the county of the defendant's residence or in which he was supposed to be; the Lord Chief Justice and Mr. Justice Gaselee thought that it was not necessary, but Vaughan, J. and Bosanquet J. thought that, looking at the effect of the different clauses, it was equally required in both descriptions of writs; (i) and certainly in the report of a prior case the learned Chief Justice also appeared to have been inclined to think that the like description of the defendant's residence as in a summons, was equally requisite in a writ of *capias*. (k) However, Mr. J. Taunton, in two recent cases in the Practice Court, noticed the distinction between the terms of the enactments in the 1st and 4th sections, and the difference between the blank in the prescribed form of summons and that of *capias*, and considered that a less degree of certainty in the description was

(i) *Bosler v. Levy*, C. P. 25th November, 1834; 1 Bing. N. C. 362; 3 Dowl. 150.

(k) *Roberts v. Wedderburne*, 1 Bing. N. C. 5, observed on in *Bosler v. Levy*, 1 Bing. N. C. 362. With respect to any argument to be drawn in any case from a comparison of the different forms of proceedings prescribed in the schedule, it is to be observed that many differences will be found, which it is most probable were accidental, and not intentional. Thus at the foot of a summons the printed direction for the memorandum as to the duration of the writ, differs from that at the foot of a *capias*, in the words *to and on*, the former being "Memorandum to be subscribed on the writ,"

and the latter "Memorandum to be subscribed to the writ," and the indorsement on a summons issued by a plaintiff suing in person is thus: "This writ was issued in person by A.B., (stating the plaintiff's christian and surname,) who resides at, &c.," whilst the indorsement on a *capias* runs—"This writ was issued in person by the plaintiff within named, who resides at, &c.," and yet it is probable that there was no reason for such variation, and that they were entirely accidental. It is probable that the legislature gave the forms merely to assist, without any intention that a small deviation, not altering the sense, according to common acceptance, much less technically, should constitute a fatal irregularity.

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required in a *capias* than in a summons, (*l*) and held that "Captain Langford, of the Honourable East India Company's Ship, the Kelly Castle, and now most likely to be found at the East India-house, in the city of London," was a sufficient description of a defendant in a *capias*; (*l*) and in a subsequent case, where the *capias* was directed to the Sheriff of Surrey, and the defendant's residence was described as of Holland-street, North Brixton, Mr. Justice Littledale held that the objection that the county of his residence was not stated was aided by the direction to the Sheriff of Surrey. (*m*) Still, however, until the point has been settled *in banc*, it must be considered uncertain whether or not the county must be named in a *capias*. If the blank in the *capias* was merely intended to require a description of the defendant's residence when actually in the county to the sheriff of which the writ is directed, then it would seem that the insertion of the county would be unnecessary, because the description is followed by the words "if he shall be found in your bailiwick," and the sheriff could only take him in *that* county; but if the filling up of the blank was intended thereby the better to describe the *actual general residence or domicile* of the defendant, without regard to the part of the kingdom he might be in at the time of his arrest, and as a *descriptio personis*, the better to identify the defendant and thereby prevent the arrest of a wrong person of the same name, then, on principle, the name of that county (i. e. where the defendant usually resides or is domiciled) ought to be inserted, without regard to the county into which the writ is to be issued; for the mere statement of a place without stating a county would frequently render the description vague, as there are many places of the same name in different counties, and it seems probable that the legislature equally intended that there should be *as full* a description of the defendant's residence in a *capias* as in a summons. There is, however, certainly a difference in the exact prescribed form of summons and *capias*, and it is to be remarked that in the rules of Mich. T. 3 W. 4, prescribing the forms of alias and pluries writs, there is continued a like difference in the blank for describing the defendant's residence. In a case in the Court of Exchequer Lord Lyndhurst and Bayley, B. considered the object of the statute was to *identify the defendant* so that the right person might be taken, and if so, then

(*l*) *Welsh v. Langford*, 1 Dowl. 498; *Bosler v. Levi*, *id.* 150; *Webb v. Law-Baffle v. Jackson*, 1 Dowl. 505.

(*m*) *Perring v. Turner*, 3 Dowl. 15;

rence, 2 Dowl. 81.

a full description of county as well as place of his general residence seems desirable. (n)

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If the defendant's general residence be in the county to the sheriff of which the writ is issued, then he is to be described as of the street and town in which his house or lodgings may be, as thus, "C. D. of — Street, in Chelmsford, in the county of Essex," or "of the parish of Hornchurch, in the county of Essex." If the defendant's residence is in another county, then thus, "C. D. who usually resides at Chelmsford, in the county of Essex, but it is supposed he will now be found in the parish of —, in the county of —." It has been held that "of Kent-street, in the county of Surrey," in a *capias*, is sufficiently particular, and the act does not require in that writ the number of the house or the parish to be inserted; (o) and it was held that "Yorkshire" is a sufficient description of a defendant's residence as far as regarded the county, although he actually resided in the town of Kingston-upon-Hull, which is a county of itself, if from the locality of the defendant's residence it might be supposed that he resided in Yorkshire, and it appearing that the defendant resided at a house within twenty yards of the boundary line of the county of York, in a street which, though it had a different name, was a continuation of that named in the writ. (p) As the prescribed forms of writs of *distringas* and *detainer* do not contain any space for the insertion of the defendant's residence (probably because under the former the goods of the defendant are to be taken in the county *wherever* they may be, and under the latter the defendant is only to be *detained* when already in the custody of the officer to whom the writ is directed,) no description of the residence of the defendant is requisite, though if there should happen to be two or more persons of the same name in the same prison or county, it would be prudent to give some distinguishing description, or at least to send an intelligent person with the officer to point out the goods or person. The statement of the *residence* of the defendant in process (excepting in proceedings by original, when the statute of additions, 1 Hen. 5, c. 5, required such residence to be stated,) is a new provision, for none was required in the body of the now abolished writs of *latitat* and *quo minus*, &c., although to avoid the danger of arresting a wrong person there was a rule re-

(n) *Price v. Huxley*, 2 Cr. & M. 211; *Webb v. Lawrence*, 1 Cramp. & M. 806.
2 Dowl. 81, S. C.

(p) *Jelks v. Fry*, 3 Dowl. 37.

(o) Per Lord Lyndhurst, C. B., in

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quiring the *addition* of the defendant, or some other *best* description, to be *indorsed* on bailable process and writs of attachment. (q)

In construing the first section, relative to the description of the *residence* of a defendant in a writ of *summons*, it has been decided not to be necessary to state the number of the defendant's house, or the *parish* where it is situate; and that therefore the description of him in a summons as "of Kent Street, in the county of Surrey," (r) or in a *capias*, "of Morpeth Place, Waterloo Road, in the county of Surrey," (s) suffices; and as in describing the local situation of buildings or land, frequently it may be difficult to give particularity, so it suffices if it appear that the *best* description has been adopted that the facts would enable the plaintiff to give. (s) A variance between the description of the defendant's residence in the *affidavit* of debt from the *capias* is immaterial. (s)

If there be an improper description, or the addition of *supposed residence* be wholly omitted, or be *indorsed* instead of inserted in the body of the writ or copy, or indorsed on the writ but not on the copy, or *vice versa*; (t) or if after the writ has been sealed, one county be substituted for another, without resealing, (u) the Court or judge will set the writ aside for irregularity under the rule Mich. T. 3 W. 4, r. 10; (t) and where the writ of *capias* omitted any statement of the defendant's residence, although the *copy* delivered to the defendant described him as "Thomas Huxley, Whitehall Yard," the Court on motion set aside the writ, although it was insisted that the object of the enactment requiring the residence to be stated was in favour of sheriffs, and to diminish the risk of taking the wrong person, and that as the right person had been taken, the defendant was not prejudiced, and could not complain; but the Court decided that the objection was fatal, observing that it is matter of great public convenience that the forms prescribed by the act should be adhered to, and that it would be impossible in every case to institute an enquiry whether the defendant had sustained any prejudice, (x) for the statute is not merely directory, and the sheriff would not be bound to exe-

(q) Rule, Hilary 2 & 3 G. 4, 5 Bar. & Ald. 560; but *semble*, virtually annulled by 2 W. 4, c. 39.

(r) *Webb v. Laurence*, 2 Dowl. P. C. 81; 6 Legal Observer, 460, S. C.

(s) *Buffle v. Jackson*, 1 Dowl. P. C. 505; *Welsh v. Lawford*, *id.* 498.

(t) *Roberts v. Wedderburne*, 1 Bing.

New C. 4; *Lindredge v. Roe*, *id.* 5; *Rice v. Huxley*, 2 Cr. & M. 211; 2 Dowl. 231, S. C.; and rule 10, M. 3 W. 4.

(u) *Siggers v. Samson*, 3 Moore & Scott, 194; 2 Dowl. 745, S. C.

(x) Per Lyndhurst, C. B. and Bayley, B., in *Rice v. Huxley*, 2 Dowl. 230, 232; 2 Cr. & M. 211.

cute a bailable *capias* if thus defective, (y) or at least the Court would prevent any prejudice from the omission to the sheriff. (z) But as the first section in express terms merely requires the insertion of the *supposed* residence of the defendant, or where the defendant is *supposed to be*, if the plaintiff had reasonable ground for naming a particular residence, and did not wilfully insert an improper description, the Court or judge would not interfere on summons or motion to set aside the writ, or try a disputed question of residence, (a) especially if the defendant do not swear that he had no knowledge or intimation of the writ until after a subsequent proceeding thereon; (b) and a variance in the description between the affidavit to hold to bail and the writ affords no objection, as the defendant may have removed since the affidavit was sworn. (c)

It has been observed that where a city, or town and county, is surrounded by another larger county, the safest course is to issue the writ into the latter, because then by section 20 of 2 W. 4, c. 39, the surrounded part of a county will be taken as part of the larger county, and then the process may be served in either. (d)

The necessity for stating "in *every* writ and copy the place and county of the defendant's residence or supposed residence, or wherein he is or is *supposed to be*," applies not only to the *first* writ of summons or *capias*, but also to *alias* and *pluries* writs, the forms of which when issued upon a writ of summons or *capias* are prescribed in the schedule of the act. (e) And the rule Mich. T. 3 W. 4, 1832, orders that any *alias* or *pluries* writ of *summons* may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case, in the *alias* or *pluries* writ of *summons*, describing the defendant as of ———, in the county of ———, (into which the *alias* or *pluries* is issued, and then referring to the description in the first writ thus,) "*late* of the place and county of which he was described in the *first* writ of *summons*;" and upon the *alias* or *pluries* writ of *capias*, referring to the

Description of
residence in con-
tinued writ or
writs into ano-
ther county.

(y) *Kenrick v. Nanney*, 2 Legal Observer, 270; 1 Dowl. 58, S. C.

(z) *Clarke v. Palmer*, 4 Mann. & Ry. 141; 9 B. & Cres. 153, S. C.

(a) 1 Arch. K. B. 4th edit. 514.

(b) *Id.*

(c) Per Taunton, J., in *Buffle v. Jackson*, 1 Dowl. 507.

(d) Dowl. Stat. 2 W. 4, c. 39, page 144.

(e) 2 W. 4, c. 39, schedule No. 1 and No. 4; and Rule Mich. T. 3 W. 4, ante, 160, 161; and see observations of Tindal, C. J., in *Roberts v. Weddowburne*, 1 Bing. N. C. 5.

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preceding writ or writs as directed to the sheriff, to whom they were in fact directed; and the *form* of an *alias* or *pluries* writ of summons and *capias* into *another county* are then prescribed, in the former, directing that the defendant shall be described as C. D., or whatever may be his name, "of —, in the county of —, late of —, in the county of —," (the original county); and in the latter, describing the defendant, as to residence, as "of —," precisely as in the first *capias*.

Since this statute and rule, it has been decided that if a *pluries capias* be issued with a *blank* for the defendant's residence, (although it appear by affidavit that the residence had been properly inserted in the *capias* or *alias*, and that between the issuing of the *capias* and *pluries* the defendant had quitted his residence, and as it was believed had gone abroad, and that the plaintiff was unable to discover his residence,) the same must be set aside as irregular, on the ground that the statute certainly intended that the residence of the party shall be described both in the writ of *capias* and in those writs which purport to be continuances of it, (f) and thereby also shewing that the last is *continued* process.

Addition of the
Degree, &c.
when or not
necessary.

Fifth, Addition of Degree.—Although the uniformity of process act has thus introduced the necessity for some statement of the *defendant's residence*, even in serviceable process, yet it does not adopt the other ancient and perhaps still better description of a defendant by his *estate or degree*, or *mystery*, as required by the statute of additions, in *original writs* and *indictments*. (g) And although there was a rule of Court requiring the place of abode and *addition* of the defendant, or some other *best* description, to be indorsed on a *bailable* writ or attachment, (h) so as to avoid the danger of arresting a wrong person, although of the same name as the intended defendant, (i) that rule seems to have been impliedly annulled by the 2 W. 4, c. 39, prescribing a form of *capias* without requiring any such indorsement; so that no form is at present prescribed as would be desirable to avert the consequences that might ensue from two or more persons of the same name being, at the same time, in the same county or prison. It is, however, essential

(f) *Roberts v. Wedderburne*, 1 Bing. N. C. 4; and see *Border v. Levi*, 3 Dowl. 150; 9 Legal Observer, 206, S. C.; ante, 176.

(g) 1 Hen. 5, c. 5, ante, 177; *Chitty's Col. Stat.* 746; *Gray v. Sidney*, 3 Bos. & Pul. 395.

(h) Rule Hil. 2 & 3 G. 4, 5 Bar. & Ald. 560.

(i) The Courts held that that rule was only directory, unless the sheriff was prejudiced, *Clarke v. Palmer*, 9 Bar. & Cres. 153; 4 Mann. & Ry. 141; and see *Rice v. Huxley*, 2 Dowl. P. C. 232.

for every careful practitioner, especially when the name of the defendant is in common use, or there be on any account a possibility of the wrong person being served with process, and still more of the goods of a wrong person being taken under a distringas, or a wrong party arrested, or taken in execution, either in the body of the writ, or by indorsement, or by some other even more distinct and specific description, as of age, height, and complexion, to prevent the possibility of mistake.

If the defendant be a *peer*, or otherwise entitled to a name of *dignity*, although the uniformity of process act is silent, yet he should be *so described* in the writ, as “Duke, or Marquis, or Earl of —,” or as the title may be; although with the exception of proceedings against a member of parliament, who is a trader, the same form of writ of summons in other respects is in all cases to be used, whether or not the defendant be privileged; and if such name of dignity be omitted in the declaration, it has been supposed to be pleadable in abatement. *(k)* In a writ against a peer or a member of parliament, in general it is usual, though not necessary, to describe either as having privilege of peerage or of parliament. *(l)* But the sixth form in the schedule to 2 W. 4, c. 39, of a summons against a member of the House of Commons, to be served upon him in order to enforce the provisions of the statute 6 G. 4, c. 16, s. 10, requires the defendant to be described as “C. D., of &c. ———, *Esquire, having privilege of parliament,*” and the omission of the latter words might in that case render the writ irregular, as an omission under the 10th rule of Mich. T. 3 W. 4.

Sixthly, Description of the Character or Right in which the Plaintiff sues, or the Defendant is sued.—The uniformity of process act, 2 W. 4, c. 39, as well in its enactments as in the prescribed forms in the schedule, is silent upon the necessity of inserting any description of the *character* or *right* in which the plaintiff sues or the defendant is sued; and it is probable that it was intended by that statute merely to require that the *form of action* should be stated, and the amount of the debt indorsed, which it was perhaps considered would sufficiently inform the *defendant* in all actions, and his *bail* in bailable actions, what was the nature of the claim and supposed liability. Since that act, it was considered by the Courts of K. B. and

Sixthly, Description of the Character or right in which the defendant is sued or the plaintiff sues.

(k) Tidd's Supp. 1833, page 66, 262, note (a); and it will be observed that 3 & 4 W. 4, c. 42, s. 11, only takes away pleas of *misnomer*.

(l) *Cantwell v. Earl Stirling*, 1 Moore & Scott, 297; 8 Bing. 174, S. C.; Tidd's Supp. 1833, p. 66.

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C. P., with reference to prior decisions, that upon a *general writ*, whether *serviceable* (m) or *bailable*, (n) and not stating the character in which the plaintiff sued, or the defendant was sued, the plaintiff was afterwards at liberty to *declare specially* in any particular character or right, as *qui tam*, or as *executor* or administrator, or as an *assignee* of a bankrupt; (o) and also it was held in the Common Pleas, that on such *general process* the plaintiff may declare *against* a defendant *as* an executor or administrator. (p) And where the *affidavit* stated the debt to be due to the intended plaintiff *as* executor, but the process was general, the Court of Exchequer refused to order the bail-bond to be cancelled. (q) It was also held, that although the process had described the plaintiff or defendant generally *as being* executor, administrator, or assignee, without introducing any words denoting that he sued *as such*, the plaintiff might declare generally in his *own right*, or against the defendant on his own liability, treating the description as a mere superfluous addition, just as if the word carpenter had been idly introduced. (r) But that^o by introducing into the writ any express statement that the plaintiff intended to sue in a particular character, as by using the word "*as executor*" or "*as assignee*," &c. then the plaintiff having so expressly limited his proceeding could not declare generally, and that if he did so, then, at least in a bailable action, the defendant would be discharged out of custody and the proceedings be set aside for irregularity. (s)

But it has been supposed that there is a difference in these respects in the practice of the Common Pleas; (t) and it is to be collected from one reported decision, that if a *bailable writ* in C. P. *be general*, and the plaintiff declare thereon *as executor*, the bail will be entitled to have an exoneretur entered on the bail-piece, but that the defendant himself cannot avail him-

(m) See cases, Tidd's Supp. 1833, p. 67.

(n) But it will be observed, that in those cases the affidavit to hold to bail correctly stated the *character* in which the plaintiff sued, the same as in the declaration. See next note.

(o) *Ashworth v. Ryall*, 1 Bar. & Adol. 20; *Isley v. Isley*, 2 Crompt. & Jer. 300; 2 Tyr. Rep. 214, S. C.

(p) *Watson v. Pilling*, 3 Brod. & B. 416; 6 Moore, 66, S. C.

(q) *Isley v. Isley*, 2 Tyr. 214; 2 C. & J. 330, S. C.

(r) 1 Dowl. Rep. 97; *Knowles v. Johnson*, 2 Dowl. 653. And see *Henshall v. Roberts*, 5 East, 150.

(s) *Douglas v. Helam*, 8 T. R. 416; *Rogers v. Jenkins*, 1 Bos. & Pul. 383; 1 Dowl. P. C. 98, 99. But see *Ashworth v. Ryall*, 1 Bar. & Adol. 20.

(t) Archbold's Prac. K. B. by T. Chitty, 4 ed. 117, 515; Arch. Prac. C. P. [19], *id.* [40]. In the latter it is observed, "Formerly, upon *general process*, a plaintiff might declare in *autre droit* as executor, &c. but *probably* that would now be deemed irregular."

self of such variance. (u) But in that case the affidavit to hold to bail was general, viz. for a debt due to the plaintiff in his own right, and the declaration disclosed that it was for a debt alleged to be due to the plaintiff in his representative character; (x) and we have seen that in another case that Court held that a defendant may be declared against as administrator, though the process described him generally. (y) However, it will be prudent in a writ in the Common Pleas, when the plaintiff sues, or the defendant is sued in a particular character, to describe him accordingly in the writ; and this indeed will be the safest course in all the Courts. (z)

It has been suggested, that in all the writs *against* an executor or administrator, it is advisable so to describe him, in order *thereby* to give him notice that the action is against him in that character, and render him liable for any subsequent misapplication of the assets; (a) but a distinct written notice would be preferable. (a) As by the 2 W. 4, c. 39, and the rule Hil. T. 1832, and Mich. T. 1832, the *form of action* must be described in the body of the writ, and in all actions for a debt, the amount of the claim must be indorsed on the process, it follows that the defendant, as well as his bail, thereby sufficiently know the *extent of liability* they would incur by becoming bail to the sheriff; and they may also search and obtain a copy of the affidavit to hold to bail; therefore so far it is not essential that the body of the writ should also state the exact character and right on which the plaintiff sues or the defendant is to be sued.

Seventhly, Names of all the Defendants.—It will be observed that the form of the writ of summons, and other writs mentioned in the act, are only adapted to the case of a *single* plaintiff or defendant; and of course when there are several parties on either side, the form must vary. (c) In such case the word “*you*,” subsequently to be found in the writ, is to be read *distributively* to each of the defendants. (d) It was always

Seventhly, The names of all the defendants must be inserted in every writ and no more. (b)

(u) *Manesley v. Stevens*, 9 Bing. 400; 1 Dowl. P. C. 711, S. C. But note in that case the affidavit was general, as for a debt due to the plaintiff himself, and the declaration was for a debt due to plaintiff as executor, a variance which of itself discharged the bail. See *Ilseley v. Ilseley*, 2 Tyr. R. 215; 2 Crompt. & Jer. 331.

(x) *Id. ibid.* See observations of Court in *Ilseley v. Ilseley*, 2 Tyr. 215; 2 Crompt. & Jer. 331.

(y) *Watson v. Pilling*, 3 Brod. & B. 446; 6 Moore, 66, S. C.; ante, 182 (p).

(z) And see 1 Arch. Pr. C. P. [40], where it is observed that it is *extremely*

doubtful whether the practice of issuing general process upon an affidavit in autre droit would now be allowed in any of the Courts, and refers to 1 Dowl. 97. And see 3 Wils. 61, 2 Bla. R. 722, shewing that only in nonbailable actions can such a variance between process and declaration be unimportant.

(a) *Rees v. Morgan*, 3 Nev. & Man. 205.

(b) See rule, ante, 160, note (u).

(c) Tidd's Sup. A. D. 1833, p. 67.

(d) *Engleheart v. Eyre and another*, 2 Dowl. 145, ante, 165.

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necessary, as well in bailable as serviceable process, to include in one writ the names of *all* the persons who ought to be made *co-plaintiffs*, however numerous; and as no amendment would now be allowed, either in adding or subtracting a name, unless in cases where otherwise the remedy would be barred by the statute of limitations, greater care must now be observed in filling up and issuing a writ in this respect than heretofore, or the plaintiff must begin *de novo*. With respect to *several defendants*, it was formerly the practice, in a joint action against *several defendants*, when *exceeding four*, to name at most four in one writ, and to issue another writ or writs against the others, naming only four in each, and it was also usual in serviceable process to include four persons as defendants, and afterwards to declare in *separate* actions against each, so that the defendants could scarcely anticipate, from the terms of the writ, how the plaintiff would afterwards declare or know for what he proceeded, and it was supposed were frequently misled. (c) But the first general rule of Mich. T. 3 W. 4, put an end to both these practices by ordering that *every* writ of summons, capias and detainer, *shall contain* the names of *all* the *defendants* (if more than one) in the action, and shall *not contain* the name or names of every defendant or defendants *in more actions than one*. (d) However numerous the defendants in a joint action may be, they must all be named in each and *every* writ issued against them, although they greatly exceed four; and when very numerous, if there be not room in the printed blanks for all the names and descriptions of residences, then the whole writ must be written; and if some one or more defendants be in one county, and the others in another county, then there must be at least as many *concurrent* writs precisely alike, as there are counties (varying of course, if writs of capias, in the direction to the sheriff of each county); and there must be as many copies of such writ as there are defendants in that county, unless there has been an attorney's written undertaking to appear for them.

Upon the affirmative or first part of this rule, it is clear that a declaration naming *more* defendants than were named in one writ would be irregular. (e) But on the latter part of the rule, it has been held, that in process *not bailable* against several defendants, the plaintiff may regularly declare in a joint action against *some* of them, provided he has done no act shewing any

(c) *Holland v. Johnson*, 4 T. R. 695;
Thompson v. Catter, 1 Moore & S. 55.

(d) See rule *ante*, 160, note (n).
(e) 1 Arch. Pr. C. P. [40].

intention to proceed against the other defendant or defendants, and especially so when the plaintiff has entirely dropped his proceeding against such other defendant. (e) And the same doctrine prevails even on *bailable* process, when against several persons for a *tort*. (f) So that until the plaintiff has *declared* on his joint process, no irregularity appears that could be taken advantage of, and therefore a defendant cannot object until after declaration. But where the names of two defendants had been inserted in a writ of summons, and afterwards they were *both* declared against *separately*, the Court set aside the declaration and subsequent proceedings for irregularity, although there were two writs and the defendants had entered separate appearances, which it was insisted waived the irregularity. (g) And where a husband and his wife had been arrested on *joint process*, and the latter had been discharged out of custody upon entering a common appearance, and afterwards the plaintiff declared against the husband alone, the Court held the proceedings irregular. (h) And in a *bailable* action, if the declaration should be against fewer defendants than those named in the writ, the proceeding would, although not within the terms of the rule, be irregular, and the Court would set aside the declaration. (i)

*Eighthly, To the Sheriff of ——— greeting:—*A writ of *summons*, we have seen, is to be addressed to the *defendant* or defendants; but writs of *distringas* and *capias* are by the *prescribed forms* in schedule of 2 W. 4, c. 39, to be directed to the *sheriff or other proper officer* for executing such process; and writs of *detainer* are by the scheduled forms to be directed to the *marshal or warden*, &c., already having the defendant in his custody. Since the abolition of the Welsh Court, the writ may be directed immediately to the *sheriff or other proper returning officer* of any county in Wales, (k) and it may issue into either of the counties palatine. (l) But they are then to be directed to the chancellor of the county palatine of Lancaster or his deputy there, or to the Bishop of Durham

Eighthly, Directions to the Sheriff or other officer, to whom writ of distringas, capias or detainer, is to be directed.

(e) Tidd's Sup. 1833, p. 467; *Evans v. Whitehead*, 2 M. & R. 367; *Bowles v. Bilton*, 2 C. & P. 474; *Knowles v. Johnson*, 2 Dowl. P. C. 653; and R. E. 3 G. 4.

(f) *Wilson v. Edwards*, 3 B. & Cres. 734; 5 D. & R. 622, S. C.; *Evans v. Whitehead*, 2 Man. & Ry. 367; *Pepper v. Whalley*, 1 Bing. N. C. 71; *Knowles v. Johnson*, 2 Dowl. P. C. 653.

(g) *Pepper v. Whalley*, 1 Bing. N. C. 71.

(h) *Cuttarne v. Player*, 3 Dowl. & Ry. 247.

(i) 1 Arch. Pr. C. P. [40], citing 4 East, 589; 1 M. & S. 55.

(k) 11 G. 4 and 1 W. 4, c. 70, s. 13.

(l) *Chapman v. Maddison*, 2 Stra. 1089; *Jackson v. Hunter*, 6 T. R. 73; see the forms of writs into counties palatine, prescribed by rule Michaelmas term, 3 W. 4.

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or his chancellor there, and in a prescribed form, *(m)* and each is to make his mandate thereon to the sheriff of the county. *(m)* Before the abolition of the former writs by 2 W. 4, c. 39, a serviceable latitat might be served in any county; but that act, section 1, implies that a writ of summons must be served in the county to the sheriff of which it is addressed, or at least within 200 yards of the border thereof, and not elsewhere; and the third and fourth clauses, as to writs of distringas and capias, limit the execution to the *exact boundaries*. If there be a liberty or franchise within a county, it seems that it would be irregular to address the process *directly* to the local officer, but that it *must* be directed to the *sheriff*, who must make his mandate thereon, *(n)* unless the writ contain a non omittas clause, as is now invariably the case *(o)* in all writs of distringas and capias. *(p)* And therefore, where the writ was improperly directed immediately to the bailiff of the borough of Southwark, it was holden absolutely *void*, and the defendant was discharged out of custody. *(q)*

The writ should be addressed to the sheriff of the proper county *very accurately*, and a mistake even in a letter in the name, *if it would alter the sense or sound, would be fatal*, as was once held the omission of the *l* in Middlesex, or the addition of an *s* after the Sheriff of Middlesex; *(r)* and although it was held in one case, before the uniformity of process act, that a writ directed to the sheriff (instead of sheriffs) of London, was sufficient, because the Courts take notice that the two sheriffs are but one officer; *(s)* yet decisions after that act came into operation, expressly deny that doctrine, and seem to establish that such a mistake is a fatal irregularity. *(t)* The *copy* of a bailable capias, delivered to the defendant, was Sheriff of London, and the writ itself was correctly sheriffs, and the Court

(m) See forms prescribed by general rule, Michaelmas term, 3 W. 4, reg. 11.

(n) *Bowring v. Pritchard*, 14 East, 289; *Bradshaw v. Davis*, 1 Chit. Rep. 374.

(o) *Post*, 190.

(p) 2 W. 4, c. 39, schedule No. 3 & 4, and see rule Michaelmas term, 3 W. 4, which directs that no additional fee shall be payable in respect of the plaintiff's introduction of a non omittas clause.

(q) *Bowring v. Pritchard*, 14 East, 289; *Bradshaw v. Davis*, 1 Chit. Rep. 374; *Grant v. Bagge*, 3 East, 128; rule Trinity, 13 G. 2.

(r) Per Lord Denman, C. J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 536; *Tyser v. Bryan*, 2

Dowl. 643; *Barker v. Weedon*, 2 Dowl. 707; 1 Cr. M. & R. 396, S. C.; but see *Sutton v. Burgess*, post, 187 (x); and *Colson v. Berens*, 3 Dowl. 253, in which the Court of Exchequer considered that the decision upon the effect of the omission of the *l* in Middlesex was too strict, as such omission could not mislead.

(s) *Clutterbuck v. Wildman*, 10 Law J. 81; 2 Tyr. 276; 2 Crompt. & J. 213; and as to Middlesex see *Barker v. Weedon*, 1 Crompt. M. & R. 396; *Jackson v. Jackson*, id. 438; 3 Dowl. 182; Bac. Ab. Sheriff, K.; 2 Ld. Raym. 1135.

(t) *Barker v. Weedon*, 4 Tyr. 860; 2 Dowl. 707; 1 Crompt. M. & R. 396, S. C.; *Nicol v. Bogn*, 10 Bing. 339; 1 Cr. M. & R. 761, S. C.

made absolute a rule for discharging the defendant out of custody, and refused leave to amend. (*u*) So where the *copy* of a writ of *capias*, delivered to the defendant, was directed to the Sheriff of *Middlesex*, omitting the *l*, the omission of the *l* was in one case decided to be a fatal irregularity, and in effect no copy at all; and Denman, C. J., observed, that the omission of a letter is immaterial, if it be not productive of a variation either in sense or sound, but if it do, it is material; (*x*) and in a subsequent case it was decided, that a writ of *capias* directed to the sheriffs of *Middlesex*, in the plural, is irregular. (*y*) However, in a subsequent case the Court of Exchequer, after reiterating the rule that a mistake in a letter will not constitute an irregularity, unless it alter the sense, appeared to think that such omission of the *l* in *Middlesex* should not according to that rule have been considered a sufficient irregularity to sustain a motion to set aside the proceeding. (*z*) And Alderson, J., in another case observed, that if the defect consist merely in bad spelling, as if the copy of a writ were in misspelling the word *sheriff* with only one *f*, perhaps the objection might not be fatal. (*a*) Where a writ of *detainer* was directed "To the Marshal of our prison of the Marshalsea," instead of "To the Marshal of the Marshalsea of our Court before us," leaving it uncertain whether the prison of the Palace Court or the King's Bench Prison was intended; this was held irregular, and the defendant was discharged. (*b*) But it will be seen hereafter that there are some recent cases which admit exceptions, when the Court think the *sense* or *meaning* of the writ or copy have not been altered by a mistake. (*c*)

Several Forms of Directions to Sheriffs, &c.—The statute 2 W. 4, c. 39, schedule No. 4, and the *General Rules*, Michaelmas Forms of directions to sheriffs.

(*u*) *Nichol v. Boyn*, 10 Bing. 339; 3 Moore & Scott, 812; 2 Dowl. R. 761, S. C.

(*x*) *Hodgkinson v. Hodgkinson*, 3 Man. & Nev. 564; 2 Dowl. 536; *Tyser v. Bryan*, 2 Dowl. 640; in *Nicol v. Boyn*, 10 Bing. 338, also Tindal, C. J., held, that the omission of a letter, not altering the sense, might not be material or objectionable. In *Sutton v. Burgess*, Exchequer, 13 January, 1835, Parke, B., it is said expressed his disapprobation of *Hodgkinson v. Hodgkinson*. See note *Barker v. Weedon*, 4 Tyr. 861; and *Colson v. Berens*, 3 Dowl. 253.

(*y*) *Barker v. Weedon*, 1 Crompt. M. & Ros. 396; *Jackson v. Jackson*, *id.* 438; 3 Dowl. 182, S. C.

(*z*) In *Sutton v. Burgess*, Excheq. R. 21 January, Hilary term, 1835, per Parke, B. and Alderson, B. In that case the copy of a *capias*, delivered to the defendant, was "take Marianne Burgess, if h (instead of *she*) be found, &c.," and the Court discharged with costs a rule for setting aside service of *capias* and delivering up bail-bond, saying the mistake did not alter the sense, MS.; and see *Colson v. Berens*, 3 Dowl. 253; *Barker v. Weedon*, 4 Tyr. 861; 1 Cr. M. & R. 396, S. C.

(*a*) *Nicol v. Boyn*, 2 Dowl. P. C. 762; 3 Moore & Scott, 812; 10 Bing. 339.

(*b*) *Storr v. Mount*, 2 Dowl. 417.

(*c*) *Post*, *Twenty-Seven*, as the consequences, &c.

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term, 3 W. 4, we have seen, give the forms of *some* directions to the sheriff, &c. in ordinary cases, and to certain other officers, (e) as thus—

“To the Sheriff of ———, Greeting.” (f)

or if to the Cinque Ports,

“To the Constable of Dover Castle, Greeting.”

“To the Mayor and Bailiffs of Berwick-upon-Tweed, Greeting.”

or

“To ——— [as the case may be] Greeting.”

“To the Chancellor of our County Palatine of Lancaster, or to his Deputy there, greeting :” (g) We command, &c.

“To the Reverend Father in God [William] by Divine Providence, Lord Bishop of Durham, or to his Chancellor there, greeting :” (g) We command, &c.

“To the Marshal of the Marshalsea of our Court before us.” (h)

“To the Warden of our Prison of the Fleet.” (i)

Other forms, as may be collected from the books of practice and decided cases, may be thus : (j)

“To the Sheriff of Middlesex.” (k)

“To the Sheriffs of the city of London.”

The following is the direction of the writ in *other* places : (j)

“To the Sheriff of our City of Exeter.”

“To the Sheriff of our city of Litchfield, and the county of the same city.”

“To the Sheriff of our city of Worcester.”

“To the Sheriff of our town and county of Kingston-upon-Hull.”

“To the Sheriff of our town and county of Newcastle-upon-Tyne.”

“To the Sheriff of our town and county of Poole.”

“To the Sheriff of our town and county of Southampton.”

“To the Sheriff of our town and county of Carmarthen.”

(e) *Ante*, 154 to 157, and Reg. Gen. Mich. T. 3 W. 4.

(f) 2 W. 4, c. 39, schedule No. 4. When the writ of *capias* is into Middlesex, it should be directed to the sheriff in the singular, although there are two officers constituting the *sheriff*. In London there are also two persons recognized as sheriffs in the plural, and the writ should be directed accordingly; but *sheriff* may suffice in writ, *Clutterbuck v. Wiseman*, 10 Law J. 81, *sed quare*.

(g) Reg. Gen. 3 W. 4, 1832.

(h) See 2 W. 4, c. 39, schedule No. 5;

Storr v. Mount, 2 Dowl. 417; 7 Leg. Ob. 301, S. C.

(i) See 2 W. 4, c. 39, schedule No. 5.

(j) See forms, 2 Sellon's Prac. 671, 672.

(k) A writ into Middlesex should be strictly in the *singular*, although there are two persons constituting only one officer. If described in *pleading* as sheriffs, it would be *demurrable*, and if so in writ, then irregular, *Barker v. Weedon*, 1 Crom. M. & R. 396; 4 Tyr. 860, S. C. *Jackson v. Jackson*, *id.* 381; 3 Dowl. 182, S. C.; Bac. Ab. Sheriff, K.; 2 Ld. Raym. 1135.

"To the Sheriff of our town and county of Haverfordwest."

In the Isle of Ely the writ is directed

"To the Sheriff of Cambridgeshire."

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To a corporate town of exclusive jurisdiction, where there are no sheriffs, the writ must be directed to the corporation by the corporate name, as thus:

"To the Mayor and Bailiffs of Berwick-upon-Tweed."

To the *coroners* of a county, &c. the writ is directed thus:

"To the Coroners of our county of ———," or "of our city of ———."

The process must be directed to the *principal officer*, as to the *sheriff* or *returning officer*, who is to have the execution of the writ, and even when by law it was essential that a writ must be executed by the officer of a liberty or franchise, the process of the superior Courts could not regularly be addressed directly to him, but to the sheriff, who was to make his mandate directed to such officer; and where a writ was directed to the bailiff of the borough of Southwark, it was holden void, and the defendant discharged out of custody. (*l*) Now as every writ under 2 W. 4, c. 39, is framed as a non omittas, the sheriff or his officer usually executes the writ, though the defendant be within a liberty or franchise.

In *Middlesex*, although two individuals act as sheriff, yet in law they constitute but one sheriff or officer; and the writ must be directed accordingly "To the Sheriff of Middlesex" in the singular, and a direction in the *plural* would render the writ irregular; though at first, under the uniformity of process act, it was considered otherwise. (*m*)

In *London*, as the *two* persons constitute *two* sheriffs, a writ should properly be directed to the sheriffs of London in the plural; and although in one case where the *writ* was incorrectly in the singular, as "Sheriff of London," it was holden sufficient, as the two sheriffs are but one officer; (*n*) yet where the writ itself was correctly directed to the sheriffs of London, and the copy served was *sheriff* in the singular, the *variance* was holden fatal; (*o*) and now if the writ or copy be *sheriff* instead of *sheriffs*, the omission of the *plural* seems to be a fatal misdirection. (*p*)

In the following places there are *two sheriffs*, viz., the cities

(*l*) *Bowring v. Pritchard*, 14 East, 289; *Grant v. Bagge*, 3 East, 128; (*n*) *Clutterbuck v. Wiseman*, 10 Law J. 81.
Bradshaw v. Davis, 1 Chit. R. 374. (*o*) *Nicol v. Boyn*, 10 Bing. 339.
 (*m*) *Barker v. Weedon*, 1 Crom. M. & R. 396; *Jackson v. Jackson*, *id.* 438; 3 (*p*) *Barker v. Weedon*, 1 Crom. M. & R. 396; 4 Tyr. 860; 2 Dowl. 707.
 Dowl. 182, S. C., *ante*, 186, 187.

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of Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich, the town of Nottingham, and the city of York. In those *cities* the writ should be directed "To the Sheriffs of our city of ———." In the town of Nottingham the direction is "To the Sheriffs of the town and county of Nottingham," and since the last mentioned decisions it should seem that a direction in the singular number would invalidate the writ.

It should seem that when any district or place, being parcel of one county, is wholly situate within and surrounded by another, a writ of distringas or *capias* may be directed to the sheriff of *either* county, to serve or execute the same within such district; (*p*) though it has been recommended that the direction be to the returning officer of the largest and surrounding district. (*q*)

It can rarely occur that it will be requisite to issue bailable process to *arrest a sheriff*; but if it should, then, if there be two sheriffs, and only one is to be arrested, the process should be directed to the other sheriff; (*r*) if only one sheriff, then to the *coroner*, for bailable process directed to the sheriff to *arrest himself* would be irregular, (*s*) though it was held otherwise as to *serviceable* process, when that as heretofore was directed to the sheriff. (*t*) If the coroner as well as sheriff are to be defendants, then the Court or Master will appoint *elisors*, to whom the writ is then to be directed. (*u*) When the writ is directed to the coroner, the officer executing it is his officer and not that of the sheriff; consequently the sheriff is not responsible for his misconduct. (*v*)

Ninthly, Non
omittas clause.

Ninthly, Non omittas clause.—It will be observed that the rule Mich. T. 3 W. 4, expressly orders that in every writ of distringas a non omittas clause may be introduced by the plaintiff without the payment of any additional fee on that account. It has been supposed that as the forms of distringas and *capias* in schedule of 2 W. 4, c. 39, prescribe the *non omittas* clause, if the same should be omitted the writ would be irregular, especially because the rule Mich. T. 3 W. 4, orders that the *omission* of *any* thing required by the act to be inserted or indorsed shall be deemed an irregularity, and perhaps afford

(*p*) Tidd's Sup. 1833, p. 83 and form there referred to.

(*q*) *Ante*, 179.

(*r*) *Letson v. Bickley*, 5 Maule & S. 144.

(*s*) *Weston v. Coulson*, 1 Bla. R. 506.

(*t*) *Mayor of Kingston v. Bubb*, 1 Dowl. 151.

(*u*) *Mayor of Norwich v. Gill*, 1 Moore & Scott, 91; 8 Bing. 27, S. C.

(*v*) *Sergeant v. Cowan*, 1 Crompt. & M. 491.

ground for the sheriff's refusing to execute it. It is to be observed, however, that it was decided before the 2 W. 4, c. 39, that if a sheriff, under a general writ not containing any non omittas clause, executed the same within an exclusive franchise or liberty, the proceeding was valid between the parties to the suit, although the sheriff might be liable to an action at the suit of the owner of the franchise for the disturbance of his franchise. (x)

The 2 W. 4, c. 39, schedule No. 4, by prescribing the form of *capias* with a non omittas, obviously intended every writ of *capias* so to operate; and it has been suggested that if a writ of *capias* omitting that clause were directed to the sheriff, he might not only refuse to execute it at all, but also the writ would be irregular under rule 10 of Mich. T. 3 W. 4, as omitting part of the prescribed form. (y)

Tenthly, That within eight days, &c.—It will be observed that the prescribed form of a writ of summons or of a *capias*, &c. after naming the defendant, or the sheriff, or other officer, distinctly commands *what shall be done*, viz. a writ of summons commands the defendant "*that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of—*(z) *in an action, &c.;*" and a writ of *capias* commands the sheriff or other proper officer, "that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of ——— if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action, &c. at the suit of A. B. or until the said C. D. shall by other lawful means be discharged from your custody," and also commands the sheriff "on execution hereof (*i. e.* on the arrest) to deliver a copy of the writ to the defendant;" and then requires the defendant to take notice, that within eight days after execution of the writ on him, *inclusive* of the day of such execution, he cause special bail to be put in for him in our Court of ———." (a) And a writ of *distringas* commands the sheriff "to distrain upon the goods and chattels of the defendant for the sum of 40s., in

Tenthly, Statement of what the Defendant or the Sheriff is required to do.

(x) *Carrott v. Smallpage*, 9 East, 330; *Gilb. Prac. C. P.* 27; *Pigott v. Wilks*, 3 B. & Ald. 502; 4 Bing. 523; 7 Taunt. 311.
(y) 1 Arch. K. B. 4 edit. 113, *sed quare*; and see *supra*, 190, 191.

(z) See observations on the too general requisition to appear in Court, *ante*, 149, note (u), and *post*, 192.

(a) See the full forms of summons, *capias*, &c. *ante*, 154 to 157, note.

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order to compel his appearance in Court to answer the plaintiff, and to return to the Court what the sheriff has done on a named day," and is subscribed with a notice to the defendant.

As respects a *Sheriff*, who is an officer of the Court, and who by himself or undersheriff is supposed to be acquainted with legal terms, this direction may be sufficiently explicit; but as regards a *defendant*, who may not be a lawyer, it neither informs him *how* he is to give bail or make a deposit, nor of his right to be taken to a friend's house for the first twenty-four hours, or to what other lawful means of discharge he may be entitled, or how or in what office he is to enter his appearance or put in bail above; and therefore in general a defendant when served or arrested, must apply to an attorney for directions, or rather authorize him to take all necessary measures for him, and therefore less particularity in the writ might have sufficed, because every attorney immediately he has merely ascertained the general description of writ will know as a matter of course what is to be done by the defendant.

Eleventhly,
Return days of
writs or pro-
ceedings in lieu.

Eleventh, Return days of writs.—It will be observed that by the forms of the writ of summons, *capias* and *detainer*, the defendant is required to appear or put in special bail *in eight days*, *inclusive* of the day of service or arrest in the named Court, and there is no express return day. Before the uniformity of process act, 2 W. 4, c. 39, the greatest niceties prevailed in taking care that all mesne process was made returnable on a proper day, and much of the time of the Court was occupied in discussing irregularities in respect of such return days. It was also a great source of vexation that writs might be made returnable and served on the very day they were issued, so as to fix the defendant with the costs of a declaration thereon, without the possibility of avoiding that expense by the most prompt payment; or if the defendant were not served with the first writ, there were several other *alias* or *testatum* writs immediately issued into different counties, greatly increasing the expense. But now every writ is to be in force *for four calendar months* from the day of issuing the same, and a writ of summons or *capias* or *detainer* is not to have any return day, and the plaintiff cannot declare until the ninth day after the service of the writ, or the arrest, nor will he be entitled to more than the costs of the retainer, instructions to sue, letter before action, and writ, and copy and service or arrest, if the defendant tender the debt and the costs of those proceedings before the expiration of

four days pursuant to the indorsed notice presently stated. But writs of *distringas* and proceedings to *outlawry* are by sections 3 and 5 to be made *returnable on some day in term*, not being less than fifteen days after the teste thereof; so that no considerable progress can be made on a *distringas* or proceedings to outlawry in the vacations, it being considered essential that the Court in banc should control all further proceedings on a *distringas* or exigent. The sheriffs, however, are required *immediately after the execution* of a writ of *capias* to return the writ to the Court, together with the manner in which he shall have executed the same, and the day of the execution thereof, and also if the same remains unexecuted, then the sheriff must return the same at the expiration of four calendar months from the date, or sooner if the sheriff should be thereunto required by order of the Court or any judge thereof. And in order to enforce the *immediate* return of either of the writs directed to the sheriff or other officer under 2 W. 4, c. 39, the 15th section and the rules of Court, presently mentioned, authorize the Court or a judge in vacation to make orders for the return of any such writ; but no attachment for disobedience is to issue before the next term; and the rule Mich. Term, 3 W. 4, directs that in case of such disobedience an attachment may issue in the next term notwithstanding *subsequent* compliance. (c)

Twelfthly, Returnable in what Court.—The forms of the writs prescribed in the schedule of 2 W. 4, c. 39, and of the alias and pluries summons and *capias*, and other writs given in the rule M. T. 3 W. 4, having been intended to be used in either of the three superior Courts, are therein printed in blank for the name or description of the *Court in which* each writ is to be *returnable*. Each is to be filled up according to the intention of the client or his attorney, in which Court he will proceed, as thus, “in our Court of King’s Bench,” or of “Common Pleas,” or of “Exchequer of Pleas;” however, with analogy to the practice before the 2 W. 4, c. 39, if a writ of summons should require the defendant to enter his appearance “in our Court *before us*,” or “in our Court of the bench at Westminster,” or “in our Court before our justices of the bench at Westminster,” or by any other terms that are considered in law sufficient to describe the proper Court, it might suffice. (d)

*Twelfthly,
Returnable in
what Court.*

(c) See post “thirty five” as to enforcing the sheriff’s return. (d) Tidd, 150, 225.

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It will be observed that the requisition to appear in a named Court, if intended to inform the defendant himself, is *too general*, and should specify the *particular office* of each Court in which the defendant is to enter his appearance, or put in bail above, and even shew *how* he is to appear; the form might be sufficient in ancient times, when the defendant actually appeared *in person* in banc before the judges, but is now only strictly applicable to the most inferior Courts, where there is no office for entering an appearance distinct from the Court itself. It will hereafter be seen, that, as attached to the superior Courts, there is a different office for each Court, in which the defendant is to appear, and but few defendants, without the assistance of an attorney, could correctly learn from the writ how and where they are to appear.

Thirteenthly,
Statement of
form of action.
(e)

Thirteenthly, "In an action on promises," [or as the case may be,] or "in an action of debt, &c." (e)—All the forms of writs prescribed by the uniformity of process act, 2 W. 4, c. 39, expressly require that the defendant shall be informed in the *body* of the process of the *form of action* in which he is sued, though not the *particulars* of the *cause of action*, and this as well in serviceable as in bailable process, although before that enactment no allusion in the *writ* to the *form of action* was required, except in proceedings by special original and on recognizances of bail, and in bailable actions when an *ac etiam* was in general required, stating the *form of action*, and then it was held that the variance between an *ac etiam* in assumpsit, and the declaration being in debt, would not be a ground of discharging a defendant on common bail, unless the double sum for bail would be above £40. (f) But now the *form of action* must be properly described in the writ although serviceable, and if the form in the writ should vary from that expressed in the previous affidavit to hold to bail, the defendant would be entitled to be discharged from custody immediately after his arrest; (g) or if the *subsequent* declaration should vary from the form of action expressed in the writ, such variance would be deemed a fatal irregularity, and entitle the

(e) It was urged that the schedule No. 4, by using the words &c. left the plaintiff to describe the form of action according to the usage of the law, and that therefore "action on the case," as intended for assumpsit, might suffice; but the Court denied such latitude, and held that the precise forms must be observed, *Richards*

v. *Stuart*, 10 Bing. 319; *Gurney v. Hopkinson*, 3 Dowl. 189; if objections taken in due time. See the act, *ante*, 154 to 157.

(f) *Mayfield v. Davison*, 10 Bar. & Cres. 223.

(g) *Barker v. Weedon*, 1 Cr. M. & R. 396; and see *Richards v. Stuart*, 10 Bing. 319, *supra*.

defendant to move to set aside the declaration.^(h) The prescribed form of the writ of summons requires the defendant to cause an appearance to be entered in the named Court, "*in an action on promises* [or as the case may be] at the suit of A. B." The form of the writ of distringas uses the expression, "*in a plea of trespass on the case*,"⁽ⁱ⁾ [or "*debt*," or as the case may be]; the capias, "*in an action on promises*," [or "*of debt*," &c.]; the writ of detainer, "*in an action on promises*," [or "*of debt*," &c. as the case may be]. And the form in a writ of summons to a member of parliament is to be, "*in an action on promises*," [or debt, &c. as the case may be] "*at the suit of A. B.*" The forms in the schedule therefore, in precise words, direct the modes of describing the forms of action in only three actions, viz. *Assumpsit*, *Debt*, and *Case*; and by the other words, "*or as the case may be*," leave it open in such other cases only to introduce any proper description. It might have been supposed that the forms were given only as examples, but in the action of *assumpsit* the form has been holden to be imperative; and although *assumpsit* had always been considered a species of action on the case, and it was usual in the introductory part of a declaration in *assumpsit* on promises to describe it as "*an action of trespass on the case upon promises*," and there is not, strictly speaking, any such thing as an *action on promises*;^(k) yet it has been decided that the directions in this act are to be strictly observed; and therefore, where a writ required the defendant to appear "*to an action of trespass on the case*," the Court of Common Pleas on motion set aside the writ for irregularity, it appearing by an indorsement that the action was not intended to be *in case*, but for a debt of £1200, the Court observing that expense would be saved in the long run by adhering to the strict rule, which if departed from would occasion a contest in every case, and every departure might be argued as to the hardship of the particular instance;^(l) and it has even been held that if the description of the form of action was "*trespass on the case upon promises*," instead of "*an action on promises*," this would constitute a fatal irregularity.^(m) A fortiori the total omission of any description of

(h) *Post*, 197; and *Scrivener v. Watley*, 9 Legal Observer, 299.

(i) See 2 W. 4, c. 39, schedule No. 3.

(k) Per Patteson, J. in *Davis v. Parker*, 2 Dowl. 539; and in *Pell v. Jackson*, *id.* 446; and in *Richards v. Stuart*, 10 Bing. 319; 5 Moore & Scott, 537, S. C. The enactment therefore, to say the least, is untechnical.

(l) *Richards v. Stuart*, 10 Bing. 319; 5 Moore & Scott, 537, S. C.

(m) *King v. Sheffington*, 1 Crompt. & M. 363; *Gurney v. Hopkinson*, 3 Dowl. 189; 1 Archb. K. B. 4th edit. 515; *sed quare*, why not reject the words "*trespass on the case*" as superfluous; the defect, it will be observed, is not an omission, but in using too many words.

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the form of action would be a fatal irregularity according to the rule Mich. T. 3 W. 4, 1832, r. 10, declaring all *omissions* to be irregularities.

But although the act in schedule No. 3, giving the form of distringas, prescribes a "*plea of trespass on the case*," a writ of summons describing the form of action thus, "an action of libel,"⁽ⁿ⁾ or "an action of slander,"^(o) has been holden sufficient, because those descriptions convey even greater information than the words "action on the case,"^(o) and because the object of the statute was to convey to the defendant information as to the nature of the action to be brought against him, and the phrase "action of slander" conveys information to him even better than the phrase "action on the case" could.^(p) However, as respects any *information to a defendant*, this very succinct notification of the intended *form* of action can rarely be of utility, and certainly it cannot supply the use of "particulars of the plaintiff's demand," which he is now entitled to in all the Courts without affidavit if a judge think fit, and this even before appearance or bail put in.^(q) If the act had required every writ concisely to state the *substance* of the *cause* of action as in a notice of action, as "in an action for £30, the price of goods sold and delivered," or for "£10 damages for an assault and battery on the — day of — last," then indeed some useful information, if at all requisite, would be afforded. In case of a material *mistatement* or *omission* in a *bailable action* in the writ, or statement in a writ of a form of action not adapted to the nature of the debt sworn to in the affidavit to hold to bail,^(r) or appearing by indorsement on the writ not to be the form adapted to the real claim, or so appearing from the subsequent declaration, the Court or a judge would discharge the defendant out of custody, or order the bail-bond to be cancelled.^(s)

We have in a preceding page shewn the importance of selecting the most appropriate form of action in cases where the plaintiff has the option of several.^(t) In a bailable action care must be observed in describing the form of action in the writ that it accord with the affidavit to hold to bail, for

(n) Per Parke, J. in *Pell v. Jackson*, 2 Dowl. 447.

(o) Per Patteson, J. in *Davies v. Parker*, 2 Dowl. 537; *sed quare*, whether the Court were aware of the precise form having been prescribed in an action on the case; and see *King v. Skeffington*, 1 Crompt. & M. 363.

(p) Per Patteson, J. in *Davies v. Parker*,

2 Dowl. 539.

(q) Rule Ill. T. 2 W. 4, r. 47. *Derry v. Lloyd* 1 Chitty's Rep. 724; R. Trin. 2 G. 4, C. P.; 6 Moore, 211.

(r) *Barker v. Weedon*, 1 Crompt. & M. 396, *post*.

(s) *Richards v. Stuart*, 10 Bing. 319; *ante*, 194, note (e).

(t) *Ante*, 150.

otherwise the defendant, after arrest; might be discharged on common bail, or the bail-bond cancelled; (s) and it is of essential importance, even in mere serviceable process, properly to determine on the correct form of action, afterwards to be adhered to in the declaration, before the writ is issued, for the plaintiff cannot *vary* from it in his declaration; and if he should do so in a *bailable* action, (t) the bail would be discharged, or the bail-bond delivered up to be cancelled; and even in a non-bailable action the declaration might be set aside for the irregularity and variance, and perhaps also the writ; (u) as where the writ of summons was in an action of "trespass," and was indorsed, debt £11. 12s. 9d., and the declaration was in *trespass on promises*, in which case Bayley, B. said, "both the writ and declaration might be set aside;" (u) and where the writ of summons was "in an action of *trespass on the case* upon promises," and the notice of declaration in "an action of trespass on the case," the Court set aside the proceedings (x) on the ground that improperly the words "of trespass on the case" were introduced between the words "an action" and the words "upon promises," and on the ground that it is better to compel suitors to adhere to the strict form, for otherwise the Court would always be discussing what deviation was allowable.

But the circumstance of a declaration commencing by alleging that the defendant had been summoned to answer the plaintiff "of a plea of trespass on the case," (instead of "in an action on promises,") and afterwards being framed in *assumpsit*, is not a ground of *demurrer*, but merely an *irregularity*, to be taken advantage of only as such. (y) It has, however, been held that if the affidavit of debt be for goods sold and money lent, the mere circumstance of the declaration containing no count for goods sold, is no ground for entering an *exoneretur* on the bail piece. (z) To avoid mistake, it may be as well here to insert the proper form in every description of action, (a) viz. :

In *assumpsit*, "in an action on promises."

In debt, "in an action of debt."

In covenant, "in an action of covenant."

Proper descriptions of forms of action.

(s) *Barker v. Weedon*, 1 Crompt. & R. 396, *post*.

(t) *Richards v. Stuart*, 10 Bing. 319.

(u) *Edwards v. Dignan*, 2 Dowl. 240; *King v. Skeffington*, 1 Crompt. & M. 363; 2 Dowl. 606, S. C.; *Scriviner v. Watley*, 9 Legal Observer, 299; 1 Arch. Pr. C.P. 40.

(a) *King v. Skeffington*, 1 Crompt. & M. 363.

(y) *Marshall and another v. Thomas*, 2 Dowl. 208.

(z) *Gray v. Harvey*, 2 Dowl. 114; but see *Barker v. Weedon*, 1 Cr. M. & R. 396, *post*.

(a) It will be observed, that an action of *replevin*, usually removed from an inferior Court, and *scire facias* and *ejectment*, are not within the 2 W. 4, c. 39, *ante*.

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In detinue, "in an action of detinue."

In a joint action of debt and detinue, "in an action of debt and detinue." (b)

In case or trover, "in a plea of trespass on the case."

In trespass, "in an action of trespass."

The non-observance of the directions in the statute, as by misdescribing the form of action "in an action of *trespass on the case* upon promises," is by the rule M. T. 3 W. 4, declared to be only an *irregularity*, to be taken advantage of in due time, and does not render the writ *void*; and if the defendant should omit to apply to set aside the proceeding in due time, or should not succeed in the application, an arrest and bail-bond, on a writ defective in stating the form of action, would continue valid, and could not afterwards be impeached by the bail. (c)

Supposing the description of the *form* of action be technically correct, then it has been considered that it would be premature, merely upon receiving *particulars of demand* stating claims properly the subjects of a *different* form of action, to move to set aside the writ or proceeding for irregularity, because the plaintiff might amend his particulars, but that the defendant must wait until the plaintiff by his *declaration* has varied from the form of action stated in the writ; (d) but that if the affidavit to hold to bail be clearly for a debt, and the form of action described in the *capias* be "in an action on the case," and be indorsed for a debt, the defendant may *immediately*, and before the plaintiff has declared, move to be discharged out of custody for the irregularity, because it is apparent that the plaintiff cannot declare with effect upon such a writ, and there is no reason for detaining the defendant longer in custody. (e)

This enactment, requiring every writ to state the *form* of action, at first occasioned innumerable irregularities, and certainly the requisition may occasion more delay in commencing an action than heretofore, when, at the instance of an angry or hasty client, an attorney would sometimes instantly cause a general writ to be issued, excepting where an *ac etiam* to arrest was essential, and afterwards *declared* in *any* form of action he might think preferable, or left the declaration entirely to the pleader; whereas now it has become essential for every attorney, before he issues *any writ*, fully to ascertain the particulars of the plaintiff's claim, and well to consider

(b) See Price's Gen. Prac. 17.

(c) *Guiney v. Hopkins*, 5 Dowl. 189.

(d) *Addis v. Jones*, 3 Dowl. 164.

(e) *Richards v. Stuart*, 10 Bing. 319;

ante, 194; *Barker v. Weedon*, 1 Cr. M. & R. 596; but see *Gray v. Harvey*, 2 Dowl. 114; *ante*, 196.

what will be the best form of action; and in doubtful cases even to take advice before he issues the writ. However, as this delay is calculated to secure more accuracy in the *first instance*, the requisition upon the whole will probably be found useful to suitors. (*f*) But as respects any beneficial information to a *defendant*, the very succinct notification of the intended *form* of action cannot be of utility, nor can the same supply the use of "particulars of the plaintiff's demand," which he is now entitled to in all the Courts without affidavit, and even before he enters his appearance or puts in bail, provided a judge think fit to order the same. (*g*)

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Fourteenthly, At the Suit of A. B., &c.—It will be observed that the prescribed forms of writs of summons and capias, in schedule 2 W. 4, c. 39, after concisely describing the form of action, state *at whose suit* the appearance is to be entered or the bail to the sheriff is to be given, or deposit made, and the other forms of process also contain requisitions to the same effect. (*h*) The Christian and Surname of all the plaintiffs in the action must here be stated, but there is not any express rule relating to the names or number of the plaintiffs, as in the case of defendants. If a writ name only one plaintiff, and the declaration two, the declaration would be set aside for irregularity. (*i*) A *misnomer* of a plaintiff, however, could no longer be pleaded in abatement, though it should seem that the 3 & 4 W. 4, c. 42, s. 11, enabling the defendant to compel the plaintiff to amend a misnomer in a declaration, applies as well to mistakes in the name of a *plaintiff* as of a defendant. (*k*) And a *misnomer of a plaintiff*, even when suing as a corporation aggregate, is not a ground of nonsuit, (*l*) unless perhaps it should appear that the defendant was misled by the misdescription. (*m*) But upon process in the name of one plaintiff, if the declaration be delivered in the name of *two*, the proceedings might be set aside for irregularity; (*n*) so if a writ be at the suit of a husband, there cannot regularly be a declara-

Fourteenthly,
Name of the
plaintiff, or at
whose suit.

(*f*) See *ante*, 117 to 125, as to the utility of the *first instructions* in an action.

(*g*) Rule H.T. 2 W. 4, r. 47; *Denny v. Lloyd*, 1 Chitty's Rep. 724; Rule T. 2 G. 4, C.P.; 6 Moore, 211.

(*h*) As to names of plaintiff and defendant, see Chitty on Pleading, 5 edit. vol. i. 279 to 284.

(*i*) *Rogers v. Jenkins*, 1 Bos. & P. 383; *Lewin v. Smith*, 4 East, 589; Chit. on Pleading, 5 ed. 282, 283.

(*k*) *Ante*, 170; 1 Arch. Pr. K. B. 3d

ed. 443.

(*l*) *Mayor of Stafford v. Bolton*, 1 Bos. & Pul. 40; *Gardner v. Walker*, 3 Anst. 935; *Jowett and others v. Charnock*, 6 Maule & S. 43; *Boughton v. Freere*, 3 Campb. 29; *Bretherton v. Wood*, 6 Moore, 141; 3 Bro. S. B. 54, S.C.; *Longridge v. Brewer*, 7 Moore, 522; 1 Bing. 143, S. C.

(*m*) *Boughton v. Freere*, 3 Camp. 29; 1 Stark. Evid. 2d ed. 411 to 415.

(*n*) *Rogers v. Jenkins*, 1 Bos. & Pul. 383.

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tion at the suit of husband and wife. (*o*) It has been decided that the prescribed form of a writ of summons, *repeating* the letters A. B. in that part of the writ, impliedly requires the *repetition* of the *Christian* and *Surname* of the plaintiff, who, in default of defendant entering his appearance, will enter an appearance for him, and that the blank in the printed form must be filled up accordingly; and where the name was omitted in that part of the writ, and the word *plaintiff* substituted, Parke, J. held the omission fatal. (*p*)

Formerly the Courts would in most cases permit an amendment of a writ by striking out or adding the name of a plaintiff; (*q*) and where the name of an official assignee of a bankrupt was omitted in the declaration by assignees of a bankrupt, the Court, on motion, permitted an amendment by introducing such name, although there was no affidavit, præcipe, or writ to amend by. (*r*) But no such amendment will now be allowed, unless the remedy would be otherwise barred by the statute of limitations, (*s*) or unless, perhaps, the proceedings have advanced far in the cause. (*t*) We have already sufficiently considered the necessity for, or expediency of, a description of the *character* in which parties sue or are sued. (*u*)

Character in
which plaintiff
sues.

Fifteenthly,
Notice to the
defendant of
the conse-
quences of his
non-appearance,
or not putting
in bail above,
and other
warnings in body
of writ.

Fifteenthly, Warnings and Notices, &c. in Writ, as "take Notice that, &c."—The writ of summons, as well as *capias*, and the *distringas* in the body of each, state *what will be the consequences* if the defendant do not enter his appearance, or in a bailable action cause special bail to be put in *within eight days* after the service of the nonbailable writ or arrest on a *capias*, inclusive of the day of service or arrest, viz. the writ of *summons* informs the defendant, "that if he do not appear in the eight days, the person or persons suing, (*repeating his Christian and Surname*, for a blank for the name, or merely inserting the word *plaintiff*, would be irregular,) (*x*) *may* enter an appearance for him, and proceed therein to judgment and ex-

(*o*) *Reels and Wife v. Robins*, Barnes, 337; Prac. Reg. 131, 132; 1 Sel. Prac. s. 1, b. 3; Tidd, 9 ed. 425.

(*p*) *Smith v. Crump*, 1 Dowl. 519; 5 Leg. Obs. 384, S.C.

(*q*) *Fox v. Clifton*, 1 Chit. Pl. 14, n. (*e*); *Baker, Assignees, &c. v. Neave*, 3 Tyr. 233; 1 Crom. & M. 112. But see *Binns and Wife v. Pratt and another*, 1 Chitty's Rep. 369; Tidd, 161; *Adamsen v. —*, *id.* note.

(*r*) *Id. ibid.*; *Baker v. Neave*, 3 Tyr. 233.

(*s*) *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 563; *Lukin v. Watson*, 2 Dowl. P. C. 633.

(*t*) *Fox v. Clifton*, 1 Chitty on Pleading, 5 ed. 14, note (*e*), an amendment just before trial.

(*u*) *Ante*, 181 to 183.

(*x*) *Smith v. Crump*, 1 Dowl. P. C. 519; *supra*, note (*p*); 5 Legal Ob. 384, S.C.

ecution ;” and in bailable process states that such consequences will ensue as are pointed out in a warning to the defendant, which the 2 W. 4, c. 39, schedule No. 4, requires to be subscribed at the *foot* of the *capias*. And the 16th section enacts, that all such proceedings as are mentioned in any *writ*, *notice* or *warning* issued under that act, shall and may be had and taken in default of a defendant’s appearance or putting in special bail, as the case may be.

It will be observed, that the prescribed form of a writ of *capias* contains in the *body* of the writ the following *notice* to the defendant :—“ And we hereby require the said C. D. to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of ——— to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or *endorsed hereon*.” This notice in general refers to the *four warnings*, No. 1, 2, 3, and 4, stated in the schedule of the act, No. 4, and are usually printed at the *foot of the writ*; (y) and it has been recently decided, that if so *there* given, and *not* indorsed, then the above words, “ *or indorsed hereon*,” need not be inserted in the writ, and indeed would be a notice calculated to mislead. (z) The second warning improperly refers to the statute 7 & 8 G. 4, c. 71, s. 2, instead of and even without noticing the 43 G. 3, c. 46, s. 2; for the most important notice to the defendant would have been his right under the last-mentioned act to deposit with the sheriff or undersheriff, or other duly appointed officer, the sum sworn to and 10*l.* for costs, and thereupon to obtain his release; and the 7 & 8 G. 4, c. 71, relates only to a deposit in the *Court*, in lieu of *bail above*. (a) Where there are *several* defendants, it has been held that the printed word “*you*,” in the form of a writ of summons, prescribed by the schedule of 2 W. 4, c. 39, is to be read distributively and that it is unnecessary to insert the words “for you and each of you.” (b) It has been objected, that the prescribed form of writ of summons is imperfect, in not informing the defendant that if he do not appear, the plaintiff may afterwards issue a *distringas* and take his goods, as another mode of enforcing appearance. (c)

(y) See the form, *ante*, 155, in note.(z) *Bridgman v. Curgensen*, 3 Dowl. 1.(a) *Geach v. Coppin*, 3 Dowl. 74.(b) *Engleheart v. Eyre and another*, 2 Dowl. 145; 6 L*eg.* Obs. 138, S. C.

(c) Price’s Gen. Prac. 18, note *.

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Sixteenthly,
Teste in name of
the Chief Justice
or Chief Baron
of the Court
out of which the
writ is issued.

Sixteenthly, "Witness Thomas Lord Denman," [or "Sir Nicolas Conyngham Tindal, Knight," or "James Lord Abinger,"] at Westminster, the — day of — A.D. 1835."—

The 12th section of 2 W. 4, c. 39, *expressly* and all the forms in the schedule *impliedly* require that all writs issued by authority of that act shall be *tested* and supposed to have been issued by the authority of the chief justice or chief baron of the Court out of which such writ is issued; or, in the case of a vacancy in those offices, then in the name of the senior puisne judge, and the non-observance would be an irregularity; (*d*) and this, we have seen, is more important than and will supply a defect or mistake in the name of the king. (*e*) Before that act it was decided that the teste of a writ, if irregular in naming a late chief baron instead of the existing one, might, on a distinct cross-rule for that purpose, be amended, and the rule for setting the same aside be thereupon discharged without costs. (*f*) But, in a prior case, a rule for setting aside the service of a copy of a quo minus, tested in the name of Sir A. McDonald, instead of Sir A. Thompson, was made absolute with costs, the copy served varying from the original, which was correct. (*g*) But since the 2 W. 4, c. 39, and rule M. 3 W. 4, declaring all omissions in writs irregularities, and the resolution of the Courts not to amend unless where otherwise the statute of limitations would bar the remedy, it may be concluded that a different rule as to permitting an amendment would prevail.

Seventeenthly,
Teste or Date of
day of issuing
the writ.

Seventeenthly, The date of the day and year of issuing.—It is also required by the same 12th section of 2 W. 4, c. 39, that "*every writ issued by authority of that act, (consequently including only writs of summons, distringas, capias, and detainer, and writs of summons against members of parliament when traders, under 6 G. 4, c. 16, but not writs of exigent or proclamation, which were antecedent to the act,) shall bear date on the day on which the same shall be issued, although in the vacation. And if not dated at all, or if dated on a day different to the very day on which it was actually issued, it would be irregular, (h) and the omission would not be cured by any indorsement on the writ. (i) This first regulation was in lieu of that in*

(*d*) *Seamble*, 2 W. 4, c. 39; rule Mich. term, 3 W. 4, r. 10; *Elwin v. Drummond*, 4 Bing. 278; 12 J. B. Moore, 523, S. C.

(*e*) *Ante*, 164.

(*f*) *Wakeling v. Watson and Williams v. Bull*, 1 Tyrw. R. 377.

(*g*) *Morris v. Herbert*, 1 Price's R.

245; *Anonymous*, 2 Chit. R. 239; 1 Tyr. R. 377, note (*a*.)

(*h*) See rule Michaelmas term, 3 W. 4, r. 10, *ante*, 161, declaring *every* omission, &c. an irregularity.

(*i*) *Anon.* 1 Dowl. 654.

5 & 6 W. & M. c. 21, s. 4, and 9 & 10 W. 3, c. 25, s. 42, which required that the *officer* who shall sign any writ or process to arrest a person before judgment, shall at the same time *set down upon* such writ or process the day and year of *his signing* the same, but which enactment seems to be virtually repealed by the substitution of the necessity for inserting the actual date in the *body* of the process. As neither of the statutes referred to prescribed *how* or in what *manner* such time shall be inserted, it has been considered on the former statutes to be immaterial whether the day or year be described in the writ in words or in figures. (k) It was holden that the statutes of William 3d, as to the officer's indorsing the day and year of issuing the writ, were merely directory, and that the omission did not vitiate, provided the teste of the writ was correct; (l) and there was a similar decision upon the rule of M. T. 1 W. 4, which required the like indorsement on process before the 2 W. 4, c. 39. (m) The object of the former statutes and of the last mentioned rule, was to apprise the defendant of the *actual time of issuing* the writ, which was essential at that time, when the date of the writ by no means corresponded with the actual time when it was issued, so that he could *not know* whether it was issued before a tender, &c.; (n) but now as the 2 W. 4, c. 39, s. 12, requires *every writ issued by authority of that act*, (n) viz. writs of summons, *distingas*, *capias*, and *detainer*, and writs of summons against members of parliament, to be dated *on the very day when issued*, the necessity for any *indorsement* of the *time* of issuing is removed, and the former statutes and rule are virtually repealed. (o) And although the direction in the former statutes and rule were considered merely directory, if there were *now* an omission of the date of issuing, or a misstatement, or an *indorsement* of the date instead of an insertion thereof in the body of a writ of summons or *capias*, it would be decided to be an *irregularity*, especially as the 10th rule of M. T. 3 W. 4,

(k) *Butler v. Cohen*, 4 Maule & Selw. 335; *Grojan v. Lee*, 5 Taunt. 651; *Eyre v. Welsh*, 6 Taunt. 333. Before the 2 W. 4, c. 39, where a wrong and impossible year, as 1807, was stated, instead of 1827, in the English notice at the foot of an attachment of privilege, the mistake was decided not to constitute an irregularity, *Steel v. Campbell*, 1 Taunt. 424; 12 Moore, 522; and an omission of the year was holden no objection, *Humphries*

v. Collingwood, 2 Barn. & Ald. 642.

(l) *Coleby v. Norris*, 1 Wils. 91; *Windle v. Ricardo*, 3 J. B. Moore, 249.

(m) See the rule 1 Crompton & Jer. 274; and *Millar v. Bowden*, *id.* 563.

(n) As an exigent or proclamation is not issued by authority of that act, it is not within this enactment, *Lewis v. Davidson*, 3 Dowl. 275.

(o) And see Tidd's Supp. 1833, p. 68, n. (b).

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declares *all* omissions to be irregularities. (p) The *copy* of the writ served on or delivered to the defendant must also contain the date, for indeed otherwise it is not a *copy*, and if the document delivered to the defendant be in blank for the date, it is a fatal irregularity. (q)

Teste of proceedings to outlawry by writ of exigent and proclamation.

But as respects proceedings to *outlawry*, the 12th section does not apply as regards the teste, because an exigent or proclamation is not a writ issued *by the authority* of 2 W. 4, c. 39. (r) The 5th section of that act however enacts, that every first writ of exigent and proclamation shall bear *teste on the day of the return of the writ* of *capias* or *distringas*, whether such writ be returned in term or in vacation; (s) and subsequent writs of exigent and proclamation shall bear teste on the day of the return of the next preceding writ. As a writ of *capias* has no fixed return day named therein, it seems to follow, that the first writ of exigent and proclamation must bear teste on the day on which the sheriff makes his return to the writ of *capias*, (t) or on that marked by the officer. (s)

There is also in the 10th section a proviso, that *continued process* to save the statute of limitations, when the first process has not been executed, must be issued in continuation of a preceding writ *within one calendar month* after the expiration of such preceding writ, and shall contain a *memorandum indorsed thereon* or *subscribed* thereto, specifying the day of the date of the first writ. It must be kept in view that the enactments in 2 W. 4, c. 39, are strictly confined to the teste or date of process in *personal* actions; and in other cases of writs that can only properly be issued in term time, as a writ of *certiorari* or *mandamus*, it must still be tested in term, though if by mistake it should be tested in vacation, it might be amended. (u)

The day of issuing process now to all intents the commencement of action.

Before the 2 W. 4, c. 39, we have seen that process (excepting when by special original) might be issued before the cause of action was complete, and it sufficed if a cause of action accrued before or during the term in which the writ was returnable, and before the time of which the declaration was enti-

(p) *Anonymous*, 1 Dowl. 654; *Perring v. Turner*, 3 Dowl. 15; and yet as regards appearance or bail above the date is immaterial, for the defendant has eight days from the service or arrest.

(q) *Perring v. Turner*, 3 Dowl. 15; post, "twenty seven."

(r) *Lewis v. Davison*, 3 Dowl. 275.

(s) This may be the very day on which

the sheriff actually returned or delivered the writ to the proper officer, or of that on which such officer subsequently marked the return, *Lewis v. Davison*, 3 Dowl. 275.

(t) Tidd's Supp. 1833, p. 99, n. (d).

(u) *Rowell v. Breedon*, H. T. 1835; 9 Legal Observer, 299.

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tled;(x) but now if either of the writs prescribed by that act were issued before the cause of action was complete, the plaintiff would be nonsuited, or if the objection were apparent, the process might be set aside for irregularity.(y) However unless the objection be apparent and clear, the defendant might be put to his plea in abatement or to wait till the trial.(y) A *capias* as well as a writ of *summons*, are now considered the commencement of the action, and neither can be issued, still less executed, before the cause of action is complete.(z) We shall presently find, that before the writ has been *executed*, it may be amended in the teste or in any other matter, provided it be resealed; if the mistake was in the teste not truly stating the day when the writ was actually issued, then the real day must be inserted; but if the defect were in any other matter, the original teste should stand, and the writ would be considered as issued on the day when *originally sealed*. After the writ has been executed, we shall find that it cannot be amended, excepting, perhaps, in the single case of the danger of a statute of limitation becoming a bar.(a) But the same strict rule does not extend to *final* process, and a *ca. sa.* may be amended in its teste by leave of the Court, even so as to affect bail.(b)

By a great improvement in practical forms the General Rules of H. T. 4 W. 4, prescribes, that in the *issue* and *nisi prius* record, and writ of trial to the sheriff, *the date of the first writ* in the action shall be accurately stated in the commencement of each of those forms, by which means at the trial all difficulty respecting the time of commencing the action is now removed. An alias or pluries need not, since the 2 W. 4, c. 39, be tested of the return day of the first writ, and their issuing is not confined by sect. 10 to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limitations.(c)

Eighteenthly, Memorandum as to duration of writ, &c.—At the foot of the writ of *summons* and *capias* issued under 2 W. 4, c. 39, the forms in the schedule prescribe that a memorandum shall be subscribed (now usually *printed*), stating

Eighteenthly, Memorandum, Notices and Warnings subscribed to writs.

(x) *Best v. Wilding*, 7 T. R. 4; *Swan-cott v. Westgarth*, 4 East, 175; *Hall v. Obder*, 11 East, 118; *ante*, 159.

(y) *Lamb v. Pegg*, 1 Dowl. 447; *Kerr v. Dick*, 2 Chit. Rep. 11: 1 Arch. K. B. 122, 577.

(z) *Alsten v. Underhill*, 1 Crom. & Mee.

492; *Thompson v. Dica*, *id.* 768; *ante*, 159.

(a) *Post*, "twenty nine."

(b) *Engleheart v. Dunbar*, 2 Dowl. 202.

(c) *Nicholson v. Lemon*, 4 Tyr. 308; *ante*, 204.

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that it will continue in force only four calendar months, (d) viz. at the foot of a writ of summons, to be served on a defendant in general, and of a writ of summons to a member of parliament, in order to enforce the provisions of the 6 G. 4, c. 16, s. 10, in the following form;—"N.B. *This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards;*" and there is a similar form to be subscribed to a writ of *capias*, excepting that the word "*executed*" is to be substituted for "*served*." The omission of or deviation from the prescribed form might constitute an irregularity under the rule M. T. 3 W. 4, r. 10.

At the foot of a writ of *distringas* there is to be another prescribed notice to the party, of his goods having been distrained, and of the necessity for his appearance in eight days, and that the plaintiff may enter an appearance for him, and proceed thereon to judgment and execution, or sometimes it may be that the plaintiff will proceed to outlaw the defendant, (e) but not in the alternative; (f) and at the foot of a writ of *capias*, besides the memorandum, there is to be indorsed a warning to the defendant. (g) The memorandum, notice and warnings are usually printed on the writs, and several of the prescribed *indorsements*, presently noticed, are also printed in blank before the writ is either signed or sealed; but, it would seem, that it would suffice to make each indorsement after the writ has been sealed.

OF THE INDORSEMENTS ON WRITS.

Nineteenthly,
Of the Indorse-
ments on writs
before served or
executed in ge-
neral.

Nineteenthly, Indorsements on Writs.—By the 2 W. 4, c. 39, certain indorsements must be made upon *every writ and copy* thereof served, and which indorsements are enforced by the rule 3 W. 4, r. 10, declaring that any *omission* shall be deemed an *irregularity*, to be set aside by the Court or a judge. It has been remarked that the rules M. T. 3 W. 4, prescribing

(d) 2 W. 4, c. 39, sched. No. 1, 4.

(e) *Id.* No. 3.

(f) *Fraser v. Case*, 9 Bing. 464.

(g) 2 W. 4, c. 39, schedule, No. 4.

It is rather singular that amongst the *warnings* at the foot of a writ of *capias* there is no intimation to the officer or the defendant of the duty of the officer not to carry the defendant to a tavern or prison, &c. within twenty-four hours from the time of the arrest, but to take him to some safe and convenient dwelling-house of his own nomination or ap-

pointment, within three miles in the same county, not being his own house, in pursuance of 32 G. 2, c. 28, s. 1. The allowance of those 24 hours afford a party time to obtain money and pay the debt and costs, and thereby avoid the expense of bail bonds and prison fees, or exactions for civility money; and it would be a very salutary rule to require an indorsement of this warning upon every writ, copy and warrant. See *Dewhirst v. Pearson*, 1 Crompt. & Mee. 365.

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the forms of writs into the counties ~~palatine~~, singularly contain no direction as to *indorsements* on those writs, but that nevertheless they must be observed. (*h*) The several requisite indorsements are, *first*, the indorsement in a bailable action of the sum sworn to; *secondly*, the indorsement of the name and place of abode of the plaintiff's attorney and of his agent; *thirdly*, the indorsement of plaintiff's name and residence when he sues in person; and *fourthly*, an indorsement of the time of service or arrest after the same has been effected. Each of these matters must, when the nature of the process so requires, be indorsed, or the proceeding will be *irregular*. There is also a *fifth* indorsement on process, whether serviceable or bailable, when the action is strictly for a *debt*, which is required by rule 5 of M. T. 3 W. 4, directing, that in such action (i.e. for a *debt*) the amount of the debt and costs claimed shall be indorsed, with a notice, that if the defendant pay the amount *within four days* no further proceedings will be had. (*i*) But this latter indorsement not being required by a *statute*, but only by a *rule*, the Court will in general permit an amendment. (*j*)

The *first indorsement* prescribed by the forms in 2 W. 4, c. 39, sch. No. 4 and 5, and usually found printed in blank on a bailable writ of *capias* and writ of *detainer*, and in the *copie* of each, is the statement of the amount of the *sum for which bail is to be required*, according to the affidavit to hold to bail or by a judge's order, and which is usually in these words:—

“Bail for £——(*h*) by affidavit.” (*l*)

or when by a judge's order, thus,

“Bail for £——, by order of the Honourable Mr. Justice ——, made on the —— day of ——, A.D. 1835.”

Forms of indorsement.

This requisition is merely a repetition of the direction of 12 G. 1, c. 29; but now under the 2 W. 4, c. 39, and the rule of M. T. 3 W. 4, r. 10, its observance has become more *important*, because the 12 G. 1, c. 29, was holden to be merely *directory*, and consequently the non-compliance with the direction was considered unimportant. (*m*) But now under the

(*h*) 1 Arch. Pr. C. P. [40].

(*i*) See rule, *ante*, 160, in notes.

(*j*) *Cooper v. Waller*, 3 Dowl. 167; *post*, “Twenty-nine.”

(*k*) N.B. The precise sum sworn to.

(*l*) Sometimes at the end of these words a statement of the time when the

affidavit was filed is made, thus—“filed 14th January, 1835, one o'clock, G.H.” But the statute 2 W. 4, c. 39, does not require the statement of such time.

(*m*) *Whiskard v. Wilder*, 1 Burr. 330; *Grice v. Allen*, Barnes, 414; *Mitchell v.*

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2 W. 4, c. 39, and rule M. T. 3 W. 4, r. 10, the non-observance would be holden a fatal irregularity. (m) Indeed this indorsement on the writ and copy delivered to the defendant, is the best authoritative intimation as well to the sheriff and the officer as the defendant, for what precise sum, by the affidavit to arrest, the defendant is to be required to give bail, and, therefore, it seems extraordinary, that even under the 12 G. 1, c. 29, the requisition was held to be merely directory. Where, however, the indorsement was "bail for £40 and upwards by affidavit," it was held that the words "and upwards" did not constitute any irregularity; (n) and this indorsement on a *capias* requires no date, (n) unless when made in virtue of a judge's order, when the form in the schedule, No. 4, requires the date to be stated. Where a defendant was arrested a *second* time on a fresh writ upon the same affidavit, by a rule of Court permitting such second arrest, it was decided not to be necessary to notice such *rule* in the indorsement. (o)

Indorsed direction not to arrest one of several defendants.

When a *capias* has been issued against several defendants, and it is not intended to arrest one of them, then it may be advisable, under the authority of the 4th section of the 2 W. 4, c. 39, to indorse on the writ and copies the order to the sheriff not to arrest the particular defendant immediately under the above indorsement, as thus:—"Arrest the within named C. D. and E. F., and only serve a copy of this writ and indorsements on the within named G. H." (p)

2. Indorsement of the name and place of abode of plaintiff's attorney or agent issuing the writ, or of plaintiff's name and address when there is no attorney.

The 12th section, in order to afford information to the defendant, to whom he may apply in order to settle the action, requires that *every writ* issued by authority of that act shall be *indorsed* with the *name and place of abode* of the *attorney actually* suing out the same; and in case such attorney shall not be an attorney of the Court in which the same is sued out, *then also* with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a *memorandum*, expressing that the same had been sued out by the plaintiff *in person*, mentioning the city, town or parish,

Gibbons, 1 H. Bla. 76; *Dorrington v. Bricknell*, 11 Moore, 445; *Martin v. Bidgood*, 12 Moore, 236; 4 Bing. 63, S. C.; Tidd, 159; *id.* Supp. A.D. 1833, p. 92, (k); *Miller v. Bowden*, 2 Tyr. R. 112, acc.; but see *Hill v. Heale*, 2 New Rep. 202; *semble contra*.

(m) *Semble*, *Webb v. Lawrence*, 1 Crom. & Mec. 806; but see Tidd's Supp. 1833, p. 92, n. (k), *contra*.

(n) *Webb v. Lawrence*, 1 Cromp. & Mee. 806.

(o) *Richards v. Stuart*, 10 Bing. 322.

(p) See further, *post*, Chap. VIII.

and also the name of the hamlet, street, and *number* of the house of such plaintiff's residence, if any such there be. The rule M. T. 3 W. 4, r. 9, further ordered, that when the attorney actually suing out *any* writ shall sue out *the same as agent* for an attorney in the country, *the name and place of abode* of such attorney in the country shall also be indorsed upon the said writ. (p)

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The 2 W. 4, c. 39, sched. No. 1, prescribes the form of such indorsement upon a writ of *Summons*, as thus:

"*This writ was issued by E. F., of —, attorney for the said A. B.*"

Forms of indorsements as to attorney who issued the writ.

And No. 4, on a *Capias*, thus:

"*This writ was issued by E. F., of —, attorney for the plaintiff [or plaintiffs] within named.*" (q)

Or if issued by an attorney as *agent* for another, then the indorsement may be in this form:—

"*This writ was issued by L. M. of No. 1, Inner Temple Lane, in the Temple, London, attorney, as agent for N. O. of Maidstone, in the county of Kent, attorney for the said A. B. within named.*"

If there be no indorsement of the name and abode of such attorney or attorneys, the Court would set aside the process for irregularity, (r) as an omission of a matter directed by 2 W. 4, c. 39, s. 12, contrary to Rule 10 of M. T. 3 W. 4, A. D. 1832, and in a bailable action, discharge the defendant out of custody, or order the bail bond to be delivered up to be cancelled. (r) And where the name of a person who was not an attorney of the Court of Exchequer, out of which the writ had been issued, was indorsed, the Court, on motion for that purpose, stayed the proceedings until the name of some other proper attorney should have been substituted, and ordered the attorney whose name was so indorsed to pay the costs of the application. (s) But where the indorsement was "Poole and Gamlen, Gray's-Inn, London," it was held a sufficient description as well of the attorney issuing the writ as of his residence, (t) although there can be only *one* attorney on the record, and although Gray's-Inn is in Middlesex, and not in London, (t) and although the Christian name of both the attor-

(p) See rule, *ante*, 161, in note, and 2 Moore & S. 335; 9 Bing. 445.

(q) Sometimes also the date of the writ is here added, as thus—"the 27th day of May, 1834;" but this is not required by the forms in 2 W. 4, c. 39.

(r) *Sheppard v. Shum*, 2 Tyr. Rep. 712.

(s) *Constable v. Johnson*, 1 Crompt. & Mee. 38; 3 Tyr. 231; 1 Dowl. 598.

(t) *Engleheart v. Eare*, 2 Dowl. 145; 6 Legal Observer, 138; and see *King v. Monkhouse*, 4 Tyr. 234; 2 Dowl. 221; 2 Crompt. & Mee. 314, S. C.; *Jelks v. Fry*, 3 Dowl. 37; and see *James v. Swift*, 4 B. & C. 681.

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nies was omitted ;(u) and a description of the attorney's abode, as of "Ely-place," was holden sufficient, (x) and this because attorneys can be more readily found than other individuals. (y) But the omission in the *copy* of a writ of the word "London" in the description of the attorney's residence in the principal writ, was deemed to be a fatal irregularity. (z) It will be observed, that when a plaintiff, whether an attorney or not, sues *in person*, then the form in the schedule requires his *residence* to be stated, and the merely describing him as *of* such a place, would be insufficient ;(a) but an indorsement of the attorney's addition, describing him as "William Searle, Bread-street, Cheapside," without the word "London," or "of," or "*residing at*" was held sufficient, (b) though the party was discharged on another ground.

The object of these regulations was to enable a defendant to know and immediately to refer to the person or persons supposed to have been concerned in issuing the process, and this probably with two objects, first, that the defendant might ascertain the precise object of the proceeding, and either pay the debt and costs within the four days allowed by the General Rules Hil. T. 2 W. 4, and M. T. 3 W. 4, or propose terms of compromise; or if the authority of the named attorney should be doubted, then to investigate the same. In furtherance of the latter object, the 2 W. 4, c. 39, s. 17, (c) and the General Rule thereon, M. T. 3 W. 4, r. 14, (d), empower the defendant to ascertain whether or not the attorney be authorized, and if he answer in the affirmative then the defendant is entitled

(u) See preceding note. And see express decision as to omission of Christian name, *Pickman v. Collis*, 9 Leg. Obs. 232. It will be observed, also, that the 24 G. 2, c. 44, s. 1, requiring *notice of action* to a justice of the peace, and that the name of such attorney or agent, and his place of abode, shall be indorsed, it was held that a signature by *initial* of the Christian name sufficed, *Mayhew v. Locke*, 7 Taunt. 63; 2 Marsh. 377, S.C.; and where one part of the Christian name was omitted, the notice was holden sufficient, *James v. Swift*, 4 B. & C. 681, 6 D. & R. 625; 2 Car. & Payne, 237, S.C. So as to *residence* describing an attorney of Birmingham suffices, though so large a place, though at Durham would not suffice, *Osborn v. Gough*, 3 Bos. & Pul. 551; *Taylor v. Fenwick*, 7 T. R. 635. But describing an attorney as of a place in London, when in fact it was in Westminster, was holden fatal in a *notice*

of action, *Steers v. Smith*, 6 Esp. 138; *Mills v. Collett*, 6 Bing. 90.

(x) *Engleheart v. Edwards*, 9 Legal Observer, 136; 2 Dowl. 145, S. C.

(y) *Engleheart v. Payne*, 2 Dowl. 145.

(z) *Smith v. Pennell*, 2 Dowl. 654.

(a) *Hodson v. Gamble*, 3 Dowl. 174.

(b) *Knight v. Moses*, January, 1835, per Patteson, J. on a summons. However, in consequence of the attorney for the defendant representing that there was a rule to the contrary, the learned judge discharged the defendant. *Sed quære* whether any distinction between attorneys and other persons is tenable, for the 12th section equally requires the place of *abode* of an attorney as the *residence* of the plaintiff when suing in person; and what is the difference between the words *abode* and *residence*? See *Hodson v. Gamble*, 3 Dowl. 174.

(c) *Ante*, 153, note.

(d) *Ante*, 161, in note.

to a written particular of the plaintiff's profession and residence. (e)

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Neither the stat. 2 W. 4, c. 39, nor the rule Mich. T. 3 W. 4, refer to or notice the enactment in 7 & 8 G. 4, c. 71, s. 8 & 9, which prohibited sheriffs from granting any warrant upon a bailable writ unless it were *delivered to him by an attorney*, or the clerk or agent of an attorney, or the writ were *indorsed by such attorney*, &c. in the presence of the *sheriff, under-sheriff, or other officer*, having the execution of process, *with the name and place of abode of such attorney*. This enactment was to prevent the fraudulent indorsement of an attorney's name by some unknown person, and thereby obtaining a vexatious arrest, and it should seem still in force, so as to require bailable process either to be *delivered by the regular attorney himself*, or his clerk or agent, to the sheriff's officer, or that one of the latter should be *seen to indorse the writ* by the under-sheriff or his officer. But where the plaintiff sues in person, and himself indorses the process as required by the statute, the case seems not to be within the 7 & 8 G. 4, c. 71. (f)

When either of the five writs is issued *in person*, or by a plaintiff himself, without the intervention of a third person, as an attorney, (as is usual when the plaintiff is an attorney,) the 2 W. 4, c. 39, s. 12, requires a still more particular indorsement, "expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be;" (g) and the schedule No. 1 prescribes the form of such indorsement to be as follows:

3. Indorsements upon writs issued by a plaintiff in person.

"This writ was issued in person by A. B., who *resides at* ———, [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]"

Form of such indorsement.

An indorsement thus, "This writ was issued in person by W. H. King, who resides at No. 7, Gray's Inn Square, London," was holden sufficient, although it was objected that Gray's Inn Square is in Middlesex and not in London, the Court saying, that as Gray's Inn Square is a place not within any city,

(e) And see proceedings, *post*, at the conclusion of this chapter.

(f) See suggestions, 1 Arch. Pr. C. P. [41], and 1 Arch. K. B. 4th edit. 124.

(g) But it will be observed that this

act does not adopt the salutary precaution in 7 & 8 G. 4, c. 71, s. 8 & 9, requiring the plaintiff to sign his name in presence of the sheriff or other officer.

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town, parish, or hamlet, the description was as good as could be given under the circumstances. (*h*) With reference to a decision upon a rule for security for costs, or a statement of the plaintiff's residence, it has been held that describing him as residing at Peel's Coffee House, Fleet Street, is not sufficient. (*i*) In the prescribed form, it will be observed, the *residence* of the plaintiff in person is to be stated; and therefore where the indorsement merely was, "This writ was issued by Charles Lewis, of No. 6, Bernard Street, Brunswick Square, the plaintiff within-named in person," this was held irregular, as the word *of* was not synonymous with "*resides*," as the place might merely be his office. (*k*)

4. Indorsement of amount of debt and costs, and notice when same may be paid to avoid further costs.

The rule Hil. T. 2 W. 4, A. D. 1832, Rule II. made before the statute 2 W. 4, c. 39, required that "upon every bailable writ and warrant, and upon the *copy* of any process *served* for the payment of *any debt*, the amount of the debt shall be *stated*, and the amount of what the plaintiff's attorney claims for the *costs* of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. The indorsement shall be written or printed in the following form:

Form of such indorsement.

"*The plaintiff claims £—— for debt, and £—— for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service(l) hereof, further proceedings will be stayed.*"

As the 2 W. 4, c. 39, abolished all prior mesne process, and perhaps affected the last-mentioned rule, it was deemed expedient by the general rule of Mich. T. 3 W. 4, made subsequent to and in order to enforce the 2 W. 4, c. 39, expressly to order that such rule of Hil. T. 2 W. 4, shall be applicable to all writs of summons, distringas, capias, and detainer, issued under the authority of 2 W. 4, c. 39, and to the *copy* of every such writ. (*m*) The form of indorsement prescribed by the rule of Hil.

(*h*) *King v. Monkhouse*, 2 Crompt. & M. 314; 4 Tyr. 234, S. C. The decisions on the form of notice of action required by 21 G. 2, c. 44, and other acts, may assist in questions of this nature, see *ante*, part iii. vol. ii. 68; and Chitty's Col. Stat. 618, note (*q*).

(*i*) *Hodson v. Gamble*, 3 Dowl. 174.

(*k*) *Lewis v. Davison*, 3 Dowl. 272, 273.

(*l*) It is now settled that the word *service* is always proper, *post*, 213.

(*m*) See rule, *ante*, 160, in note.

T. 2 W. 4, it will be observed, does not say "arrest" or "execution," but merely uses the term *service*, and which term was probably prescribed to be indorsed alike as well on bailable as on serviceable process, because in both cases a *copy* of the writ is to be delivered to the defendant, and he is to have four days from the *service* of *that copy*, and not from the arrest or execution of the writ. The word *service*, therefore, referring to the delivery of the copy of the process, is most appropriate, and the use of the word arrest or execution might in that respect actually mislead and be improper, unless the copy were served *immediately* after the arrest.^(m) There has, however, been some difference of opinion on that point, though it seems to be now settled that the very word *service*, used in the rule of Hil. T. 2 W. 4, and referred to in rule Mich. T. 3 W. 4, ought *always* to be adopted,⁽ⁿ⁾ and not the word "execution" or "arrest."⁽ⁿ⁾ But as this particular indorsement is not directly prescribed by the *statute* 2 W. 4, c. 39, but merely by the *rule of Court* of Mich. T. 3 W. 4, the judges have come to a general resolution to permit the plaintiff to *amend* bailable or serviceable process when *this* indorsement is defective, or even entirely omitted, although in general no amendment of process is now allowed except in the single instance when the statute of limitations would otherwise constitute a bar; and now, when a motion has been made to set aside process, or the copy served in respect of a defect of this nature, the course is for the Court or a judge to permit an amendment on payment of costs, and allowing to the defendant four days from the time of the amendment for payment of debt.^(o)

Perhaps the requisition of this indorsement, the terms of which are compulsory on the plaintiff, is one of the most important and essential improvements in modern practice. Before this regulation, it was the practice of some inferior practitioners to issue a writ returnable even on the same day, or to serve the writ on the return day, and immediately after the service to declare *de bene esse*, so that the defendant could not avoid an accumulation of costs; and even if ready to

(m) *Evans v. Bidgood*, 4 Bing. 63; *Elliston v. Robinson*, 2 Dowl. 241; and the omission was at first considered an *irremediable irregularity*, because the rule Mich. T. 3 W. 4, is to be considered *compulsory*, and not merely *directory*, *Ryley v. Boissomes*, 1 Dowl. 383; *Tonkins v. Chilcot*, 2 Dowl. 187; *Urquhart v. Dick*, 3 Dowl. 17; *Colls v. Mordeth*, *id.*

23; *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 101, S. C.; *Cooper v. Walker*, 3 Dowl. 167. But now the Courts permit an amendment, *Shirley v. Jacobs*, 5 Moore & Scott, 67, and other cases, *post*.

(n) *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 101, S. C.; *Hooper v. Walker*, 1 Crompt. M. & R. 437.

(o) *Id. ibid.*

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pay he could not effect a settlement without taking out three several summonses for staying proceedings on payment of debt and costs, during which the latter continued to accumulate; but the effect of this amelioration in the practice is to allow the defendant four clear days, exclusive of that on which the process was executed, to pay the debt and costs, even without the expense of a summons; and, on the other hand, he is only allowed four days, for after that time it is reasonable that during the remaining four days antecedent to appearance or bail above, the plaintiff should be preparing his declaration, in order to declare on the ninth day, so as to avoid further delay. And therefore, unless the defendant pay the debt and costs within the allowed four days, he cannot afterwards do so without a summons and order, and paying what further costs may have been incurred. (*p*)

With analogy to some decisions upon the 12 G. 1, c. 29, (viz. that the indorsement of the sum for which the defendant was to give bail, according to affidavit, was only *directory*), it might be supposed that this rule of Court also was merely directory in requiring such indorsement, but as the object of the rule of Hil. T. 2 W. 4, repeated in the rule of Mich. T. 3 W. 4, 1832, was to afford the defendant an opportunity, in serviceable as well asailable process, to pay the debt and costs, to prevent an increase of expense, the omission of or imperfection in such indorsement is now considered a fatal though amendable irregularity, (*q*) and extends as well to writs against attornies as against other defendants, although it was insisted that as they are acquainted with the law, so much strictness in proceedings against them ought not to be required. (*r*)

But the very terms of the rule only apply to a writ issued for a *debt*, (*s*) and not to a writ partly for a debt and partly for damages, (*t*) as an action of assumpsit for the value of a stack of hay, the price of which the plaintiff had paid to the defendant, and for damages for not having had the unmolested standing thereof on the defendant's land, pursuant to agreement; (*u*) and in an action on a bail bond, or a replevin bond, it is not necessary to indorse the amount of the debt and costs. (*x*)

(*p*) Price's Gen. Pr. 66.

(*q*) *Ryley v. Boissomes*, 1 Dowl. 383; *Tomkins v. Chilcote*, 2 Dowl. 187.

(*r*) *Tomkins v. Chilcote*, 2 Dowl. P. C. 187.

(*s*) *Curwin v. Moseley*, 1 Dowl. 432.

(*t*) *Perry v. Patchett*, 1 Cromp. M. & Ros. 87; 2 Dowl. 667; S. C. *Curwin v.*

Moseley, 1 Dowl. 432; and see analogous decision, *Mansfield v. Brearey*, 1 Adol. & El. 347.

(*u*) *Perry v. Patchett*, 1 Cromp. & M. 87; 4 Tyr. 725, S. C.

(*x*) *Rowland v. Dakeyne and others*, 2 Dowl. 832; 1 Crom. M. & R. 29; *Smart v. Loveck*, 3 Dowl. 34.

An indorsement thus: "The plaintiff claims 20*l.* 4*s.* 6*d.* for debt, with interest thereon, from the 13th day of March last, and 3*l.* for costs; and if the amount thereof be paid, &c.," but without calculating and stating the amount of the interest, was holden in full Court to be sufficiently certain. (*y*)

It would be improper to indorse as the debt a sum more than is really due; and if much too large a sum should be indorsed, and afterwards on payment into Court of a less sum, the plaintiff should accept it, and proceed no further, the Court would no doubt, on an early application in the vacation by the defendant, deprive the plaintiff of more than the costs of his writ, or at least make such rule or order that he would proceed at his peril as to further costs. (*z*) If there should be no indorsement, or one clearly insufficient, the Court or a judge might set aside the writ as irregular, (*a*) or in a bailable action order the bail bond to be cancelled; however, as this indorsement is not enjoined by *statute*, but only by the *rule of Court* Michaelmas term, 3 W. 4, the Court or a judge will now, we have seen, allow a defect in *this* indorsement to be amended. (*b*)

Supposing that there should be a mistake in the indorsement, either in stating the debt too high or too small, it should seem that either party might obtain an amendment in the amount on summons, and if defendant should not pay the sum indorsed and costs within the named time, the plaintiff would be at liberty to declare and deliver particulars for and proceed and recover a larger sum, and would not be absolutely bound by the sum named in the indorsement, although it might *prima facie* appear to be the limit of his claim. It has been insisted that this indorsement ought to be *dated*, but the objection was overruled, because the prescribed form does not require any date; (*c*) and it has been decided that if the defendant improperly gets possession of a writ of summons, and thereby prevents an indorsement of the amount of the plaintiff's claim, the Court will compel the defendant to pay the costs. (*d*)

The rule Hilary term, King's Bench, 2 & 3 G. 4, in order to prevent the arrest of a wrong person, ordered that the defendant's attorney or agent should indorse on the writ *the place of abode and addition* of the defendant or *such other descrip-*

No indorsement on bailable process of the abode, addition or other description of the defendant is now necessary, though perhaps advisable.

(*y*) *Copello v. Brown*, 3 Dowl. 166; *Sealy v. Hearne*, *id.* 196.

(*z*) *Elliston v. Robinson*, 2 Crompt. & M. 343; 2 Dowl. 241.

(*a*) *Ryley v. Boissomas*, 1 Dowl. 383; *Jones v. Price*, 2 *id.* 410.

(*b*) *Ante*, 213, (*o*); *Urquhart v. Dick*, 3

Dowl. 17; *Cooper v. Waller*, *id.* 167; *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 167, S. C.; *Hooper v. Walker*, 1 Crompt. M. & R. 437.

(*c*) *Webb v. Lawrence*, 1 Dowl. 81.

(*d*) *Brook v. Edridge*, 2 Dowl. 647.

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tion of him as such attorney or agent might be able to give. (c) But it has been suggested that since 2 W. 4, c. 39, requires the *residence* of the defendant to be stated in a summons and *capias*, and does not notice the above *indorsement*, or any statement of the defendant's addition, it may be inferred that such indorsement is no longer necessary; and when such indorsement was required, although the sheriff might refuse to execute the writ unless so indorsed, (f) yet the Court would not on that account set aside the writ for irregularity, but only relieve the sheriff. (g) In cases, however, where the name of the defendant is very common, or where it is known that there are several persons of the same name, then a very particular description of the intended defendant is certainly advisable, although not expressly required; and indeed the most eminent work on the practice of the Courts has appeared to consider that the above rule is still in force in the Court of King's Bench. (h)

OTHER GENERAL POINTS.

*Twentieth, Of
Concurrent
Writs into dif-
ferent Counties
at the same
time.*

Twentieth, Although the 2 W. 4, c. 39, is silent on the subject, and does not in *terms* permit a plaintiff to issue and have in force *at the same time* several *original* or *first* writs of *summons* or *capias*, &c. into different counties, and at first it seems to have been supposed that such proceedings would not be regular; (i) yet it is *now* settled that a plaintiff may at the same time, in order to expedite his proceedings, and take the earliest opportunity of executing mesne process in one county or the other, issue several writs of *the same nature simultaneously* into different counties, and when it is supposed that the defendant is shifting from one to the other, it may be advisable thus to issue two or more writs of summons or *capias* into different counties at the same time, so as to serve or arrest the defendant in one or other of the counties; but this cannot perhaps be done so as to charge the defendant with the expense of more than one of such concurrent writs, (k) unless it be clearly

(c) See rule in 5 Bar. & Ald. 560.

(f) *Kewrick v. Nanny*, 1 Dowl. 58.

(g) *Clarke v. Palmer*, 9 Bar. & Cres. 153; 1 Arch. K. B. 4th ed. 124.

(h) Tidd's Supp. 1933, p. 93, *sed quære*.

(i) *Coppin v. Potter*, 10 Bing. 445; but see *id.* 555.

(k) *Dunn v. Harding*, 10 Bing. 553; 2 Dowl. 803, S. C., overruling that part

of *Coppin v. Potter*, 10 Bing. 445, where the contrary was supposed. It is the same as to final process, as to several writs of *fi. fa.* or *ca. sa.*, though after the sheriff has taken *any thing*, however small, under one *fi. fa.*, there could not be any levy under another writ of execution, before the writ, in part executed, has been returned, *Hodgkinson v. Walley*, 2 Tyrw. 174; *Dicas v. Warne*, 10 Bing. 341.

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established that the defendant was purposely shifting from one county to another to avoid service; and it has been recently decided, where a plaintiff had issued three several serviceable writs in the same action, and without discontinuing had also issued a *capias* and arrested the defendant, yet having previously given the defendant notice not to appear to the serviceable writs, such proceedings were regular. (l) In case of *Concurrent* writs into different counties, whether of summons or *capias*, the form of each is to be *exactly the same*, with the exception of the difference in the description of the defendant's supposed residence in the second writ of *summons*, and the direction to the sheriff in a *capias*. And it should seem that then the form of an alias or pluries summons, prescribed by the rule of Michaelmas term, 1832, as to the double description of the defendant's residence, would not apply. A *Precipe* of each writ, stating the county into which it is issued; and if a *capias*, stating where the *original affidavit was filed*, (m) should be left with and filed by the officer, who signs the second or subsequent process. And it is not, as has been supposed, necessary even to file with the officer, who signs such second or subsequent *capias*, an *affidavit copy* of the original affidavit to hold to bail, and still less is it necessary to file any fresh affidavit. (n) In case the defendant should be arrested upon either of the concurrent writs, then it is advisable for the plaintiff's attorney immediately to give notice to the undersheriff and officers, who have in their possession the other writ, of such arrest, so as to prevent a second arrest for the same debt. (o)

Forms of *Concurrent* writs.

Twenty-first, The statute 2 W. 4, c. 39, abolishes most writs not thereby prescribed; and as it gives no form of a *testatum* writ formerly issued into another county, that form is virtually abolished. But under the 14th section, the judges pronounced the general rule of Mich. T. 3 W. 4, (2 Nov. 1832,) ordering that any *alias or pluries writ of summons* may, if the plaintiff shall think it desirable, be issued into another county; and any *alias or pluries writ of capias* may be directed to the sheriff of any other county; but in such case it is ordered that the plaintiff shall, upon the alias or pluries writ of summons; describe

Twenty-first, Of *Alias and Pluries* writs of summons and *capias*.

(l) *Chapman v. Vandevelde*, Hil. T. 1835, K. B. Prac. Court, 9 Leg. Obs. 300; and see *Bishop v. Powell*, 6 Term R. 616, S. P.

(m) See form in *Dunn v. Harding*, 10 Bing. 553.

(n) *Id. ibid.* It is singular how that supposition originated, certainly the 12

G. 1, c. 29, contains no such requisition.

(o) But *semble*, no action could be supported for a second arrest in consequence of the neglect, *semble*, *Scheibel v. Fairbairn*, 1 Bos. & P. 388; *Page v. Wiple*, 3 East, 314; *Powell v. Henderson*, 1 Chitty's Rep. 392.

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the defendant as late of the place of which he was described in the first writ of summons; and the alias or pluries writ of *capias* *must* refer to the preceding writ or writs as directed to the sheriff, to whom they were in fact directed. (*p*) But an alias or pluries need not, since the 2 W. 4, c. 39, be tested of the return day of the first writ, unless in proceedings to save the statute of limitations. (*q*) With respect to the continuation of process to prevent the operation of a *statute of limitations*, they are particularly regulated by the 10th section of 2 W. 4, c. 39, and must be strictly observed, as will be shewn in a subsequent distinct chapter. It has however been decided, that an alias *capias* may be issued more than four months after the expiration of the first *capias*, without affecting the validity of the former writ, and the continuances between the first writ and the subsequent writ may, as formerly, be entered at any time, unless the writs were issued with a view to avoid the statute of limitations, *in which case only* the direction in sect. 10 must be strictly observed. (*r*)

Form of Alias
or Pluries sum-
mons.

The same rule further ordered, that the *alias or pluries writ of summons* into another county shall be in the following form :

William the Fourth, &c.

To C. D. of —, in the county of —, late of —, in the county of —, [the original county]. We command you as before [or often] we *have commanded you*, &c. (*s*) [as in the writ of summons No. 1 in the schedule of the said act].

The like of
Alias or Pluries
Capias.

And that the *alias* and *pluries* writ of *capias* shall be in the following form :

William the Fourth, &c.

To the Sheriff of —.

We command you, *as heretofore we have commanded the*

(*p*) See observations of Tindal, C. J., in *Coppin v. Potter*, 10 Bing. 444. But the plaintiff may have *concurrent* writs of *capias* into different counties at the same time, *Dunn v. Harding*, 10 Bing. 555; and this upon the same affidavit of debt, *Rodwell v. Chapman*, 1 Dowl. 634; 1 Cronin & M. 70, S. C.; and in that case it is presumed that each *concurrent* writ would be independent of and not refer to the other. But in the case of an *alias* or *pluries* writ of *capias*, it has been supposed that there should be an affidavit or copy of affidavit of debt, filed with the filicer or proper officer for each county, per Tindal, C. J., *Dunn v. Harding*, 10 Bing. 555, and see *post*, 219. But

see 12 G. 1, c. 29, which seems only to require one affidavit of debt to have been made and filed, or left in a proper office.

(*q*) *Nicholson v. Lemon*, 4 Tyr. 308.

(*r*) *Id. ibid.*; 2 Dowl. 296; 2 Cronin & M. 468.

(*s*) This alias or pluries clause is only required where an *alias* or *pluries* writ is issued, and not when several writs of summons or *capias* are issued, and *concurrent* at the same time in different counties, in which case the writ may, it is presumed, be *exactly alike*, excepting in the name of the sheriff, and residence or description of defendant; *semble*, *Dunn v. Harding*, 10 Bing. 553; and see the form of *præcipe*, *id.*; *post*, 219, note (*y*).

sheriff of —, (t) that you omit not, &c. [as in the writ of *capias* No. 4 in the schedule of the said act].

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And the 94th rule of Hil. Term, 2 W. 4, orders that it shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent.

With analogy to the decision in favour of concurrent first writs of summons or *capias*, it would seem that there might be concurrent alias and *pluries* writs of summons or *capias* into several different counties. (u)

Twenty-second, Although there is *no enactment* requiring more than *one* affidavit of debt to be made and filed before arrest, yet for a long time it was supposed that upon issuing *every* process, whether a duplicate of the first writ into another county, or an alias or *pluries capias*, when signed by an officer who was a different person to the signer of the first process, there must be either a *fresh affidavit* or an *office copy of the original affidavit* at the same time filed; so that the defendant, when he had been arrested, might resort there and obtain a copy of the affidavit on which he had been arrested. (x) But this we have seen was held unnecessary in the case of a second *concurrent* writ of *capias* into another county, although even then it may be advisable in the *præcipe* for the second or subsequent writ, to state *where* the original affidavit was filed, whereby the defendant would be informed to what officer he should apply to obtain a copy of such affidavit. (y) Afterwards it was held, that even on issuing an *alias* or *pluries capias* into a different county, no *fresh* affidavit or even an office copy was necessary to be filed with the officer signing and issuing the latter, provided he was the *same filacer or officer*, or even the same deputy who signed the first writ. (z) And now it seems that the *swearing* to any second affidavit is in no case requisite; but that it suffices to file an office copy of the original affidavit with the officer who signs and issues an alias or *pluries capias*,

Twenty-second,
Of the supposed necessity for filing a *Second Affidavit* to hold to bail or office copy.

(t) See the last note.

(u) *Dunn v. Harding*, 10 Bing. 553; 2 Dowl. 803, S. C.

(x) It has been supposed that the 12 G. 1, c. 29, requires the affidavit of debt to be sworn before the issuing of even continued process, upon which the defendant is actually arrested; see argument in *Coppin v. Potter*, 10 Bing. 443. But it suffices to swear the affidavit

either before the officer issuing the process or in Court, or before a judge or commissioner, and no intention to require several affidavits appears from the act.

(y) *Dunn v. Harding*, 10 Bing. 553, where see the form of *præcipe* as thus:—“Oath for 300l. as per affidavit on issuing *capias* into Middlesex. November 16, 1833.”

(z) *Evans v. Bidgood*, 4 Bing. 63.

Form of *Precipe* of *Capias* into another county

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and that only when such officer is a person different to the officer with whom the original affidavit was filed. (a) It seems, however, as the safest course, to be advisable in all cases to file with the officer signing or issuing every second or subsequent process of any description, an office copy of the first process; and also a *præcipe* distinctly referring to the original affidavit, as thus:—"Oath for £——, as per affidavit on issuing *capias* into *Middlesex*, November 16, 1833," the form adopted in a late case. (b)

Twenty-third,
The *Precipe*
for every writ.

Twenty-third, Præcipe.—As soon as the body of mesne process had been duly filled up, and before it is taken to be signed, it has always been the *practice* for the plaintiff's attorney to draw up a *præcipe* or concise memorandum of the substance of such writ, of course varying according to the nature and particulars of each writ, and although the uniformity of process act, 2 W. 4, c. 39, is silent as to such *præcipe*, this is still the practice in all the Courts; and in the Exchequer such a document was, by a particular rule, promulgated before that act, but still in force, (because not inconsistent with its provisions,) *expressly* required, (c) and which must specify the county into which the writ is to be issued, the names of every party, plaintiff and defendant, the name and address of the attorney issuing the same, and the day of the date on which the writ shall be issued. (c) And although the Court of Common Pleas in one case treated this document as wholly devoid of

(a) *Baker v. Allen*, 7 Bar. & Cres. 526; *Rodwell v. Chapman*, 1 Crompt. & M. 70; *Coppin v. Potter*, 10 Bing. 441; *Dunn v. Harding*, *id.* 553; *semble*, that the sole object of the 12 G. 1, c. 29, was to require an affidavit of debt upon which a party was to be arrested, to be made, and perhaps filed; so that the party swearing might be indicted for perjury, if he swore falsely, but without any regulation requiring more than one affidavit; and quære now whether in any case an office copy of the principal affidavit need be filed, and on what legal authority it can be required?

(b) *Dunn v. Harding*, 10 Bing. 553; and see *Coppin v. Potter*, *id.* 441.

(c) Rule Mich. 1 W. 4, 1 Tyr. Rep. 157; Price's Prac. 50; Price's Prac. of all the Courts, 23, 24; Reg. Gen. Exch. Easter, 45 G. 3; 8 Price, 506; 1 Chitty's Rep. 186; Tidd, 9 ed. 149, 154. And see Tidd's Supplement, 1833, pages 72, 73, 77. The Rule M. 1 W. 4, in the Exchequer, is thus: "That a *præcipe* or

"particular of every writ to be thereafter
"issued in the office of pleas in this
"Court, containing the county into
"which the same shall issue, the names of
"every party, plaintiff and defendant
"therein, the name and address of the
"attorney issuing the same, and the day
"of the date on which the same shall be
"so issued, shall be delivered to the officer
"of the Court on his being required to
"sign such writ; and which *præcipe*
"shall be duly filed on files to be pro-
"vided by said officer for each term and
"vacation, according to the county into
"which the same shall be issued, which
"shall be kept on a similar file by the
"officer of the Court; and to which
"præcipe any attorney of this Court, or
"his clerk, shall have access on payment
"of the fee payable in respect thereof."
See Price's Gen. Prac. 23, 24, in note.
It would be desirable if this rule were
extended to all the Courts; and at all
events its requisites should be observed
in practice.

utility, and termed it as a worthless instrument, (d) it nevertheless is useful to be adopted in all the Courts, so as to provide against difficulties and disputes respecting the terms of the writ itself, in case of loss or non-production of the original, or of the copy thereof served on the defendant, (e) or of some error therein, or in case the defendant should lose the copy of the writ served upon him, and forget and be unable readily to obtain the particulars of the writ, in such case it has been held that a new writ may be drawn up from such *præcipe*, (f) or the defective writ might be amended, in cases where the statute of limitations would otherwise constitute a bar. (g) By reference also to the *præcipe* of a *capias* properly framed in shewing where the *original affidavit of debt* has been filed, the defendant may always be informed when he may search for and obtain a copy of such affidavit. (h) The *præcipe*, however, in K. B. and C. P. certainly has been treated as forming no essential part of the proceeding in an action; and it has been held, that a variance between the same and a *capias* will not in general be material; (i) nor need it disclose that a *capias* was indorsed for bail by *affidavit*. (k) The subscribed forms of *præcipes* will for the present suffice. (l)

(d) *Boyl v. Durand*, 2 Taunt. 161; and see *Usborne v. Pennell*, 10 Bing. 531.

(e) *Coppin v. Potter*, 10 Bing. 445.

(f) MS. in a case where in answer to a plea of the statute of limitations, it was necessary to reply and prove the issuing of a writ that had been actually delivered to the undersheriff of Kent, and lost in his office, he was allowed, after a lapse of several years, to return *non est inventus* on a fresh writ framed from the *præcipe*

in the office.

(g) *Green v. Rennett*, 1 T. R. 782; *Adams v. Luck*, 6 Moore, 113; 3 Brod. & B. 23; *Walker v. Hawkey*, 1 Marsh. 399, 5 Taunt. 853.

(h) *Coppin v. Potter*, 10 Bing. 441; *Dunn v. Harding*, *id.* 553.

(i) MS. 1814, 1 Arch. Pr. K. B. 4 ed. 126, note (b).

(k) *Husband v. Pennell*, 10 Bing. 531.

(l) Middlesex.* *Summons.** James Atkins and Thomas Adams against Benjamin Thompson, of the White Hart Inn, Barnet, in the County of Middlesex, and John Dewar of the same place and county. On Promises.* Dated Feb. 1, A. D. 1835. By E. F. of —, Attorney for the Plaintiffs.

Claim indorsed £— debt, £— costs.

Middlesex. *Capias* for George Dunn against Phillip Harding, of Barnet, in the county of Middlesex. On Promises. By RHODES and BEEVOR,

16, Chancery Lane, London, Attornies for the Plaintiff.

Indorsed for bail for £—, by affidavit.

Indorsed claim, debt £—, costs £—.

Devonshire. *Capias* for George Dunn against Phillip Harding, of —, in the county of Devon. On Promises. By RHODES and BEEVOR,

16, Chancery Lane, London, Attornies for the Plaintiff.

Oath for £300, as per affidavit on issuing *capias* into Middlesex, Nov. 16, 1833.†

* It will be observed that the form of *præcipe* here given is as concise a statement of the substance of the peculiarities of the writ as practicable. Sometimes after Middlesex are introduced, “to wit;” and in lieu of the word *summons*,

“writ of *summons*,” and in lieu of promises, “action upon promises.” But the above concise form would suffice.

† See form taken from *Dunn v. Harding*, 10 Bing. 553.

Form of a
præcipe for a
writ of *summons*.

Præcipe for
Capias.

The like for a
Concurrent *ca*-
pias into an-
other county.

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Upon the particular rule of the Court of Exchequer, expressly requiring, as we have seen, a formal præcipe, it has recently been decided that the mere fact of a *præcipe* for an alias *capias* not being to be found, is no ground for setting aside the proceedings to outlawry, it being positively sworn that a proper præcipe was *originally left* in the office. (*m*) The forms of præcipes to be found in the books of practice are less particular than might be recommended; as for instance, in describing the plaintiffs as *A. B. and others*, and the defendants as *C. D. and others*, although the rule in the Exchequer expressly requires the names of *every party* to be inserted in the præcipe. As a general rule it is recommended that, according to the varying circumstances of each case, every præcipe do at least state concisely *every particularity*, which ought to be filled up in the blanks in the printed forms of the writ itself and indorsements thereon, so that in case of loss, the plaintiff's attorney, or the defendant, may at any remote time be able, by search in the proper office, to ascertain the exact terms of the writ that had been issued.

Twenty-fourth,
By what officer
each writ is to
be *Signed* and
how.

Twenty-fourth, Signing of Writ.—The writ itself is usually on parchment when completely filled up, and with the memoranda, notices and warnings, when requisite, printed thereon and usually also with printed *indorsements* in *blank*; (*n*) first, for the insertion of *the sum sworn to* on a bailable *capias*; secondly, for the *name and residence of the plaintiff's attorney*, or the name and precise residence of the plaintiff, when suing in person, who issued the writ; thirdly, for the amount of the *debt and costs* intended to be *claimed*; and fourthly, for inserting the day the writ was served or executed. The parchment writ, when filled up in all respects in the body of the writ, is to be taken to the proper officer, to be by him duly signed. The offices and officers are different, according to the Court into which the writ is to be returnable.

The 2 W. 4, c. 39, s. 1, enacts that every writ of summons “shall be issued by the officer of the *Courts respectively* by whom process, serviceable in the county therein mentioned, hath been heretofore issued from such Court, and that such writ shall be served in that county; but 3 & 4 W. 4, c. 67, after

(*m*) *Probert v. Rogers*, 3 Dowl. 170.

(*n*) It is not material whether the indorsements be completed before or after

the writ is sealed, provided they be before executed.

reciting the expediency that all writs in K. B. should be *signed* by *the same officer*, repealed^(p) that enactment pro tanto, and annulled the rule thereon for K. B. of Mich. T. 3 W. 4, and enacted from and after the passing of the latter act, all writs of summons, distringas, capias, and detainer, issued into *Middlesex* from the Court of King's Bench, shall be *signed, sealed, and issued*, and the fees thereon shall be taken and accounted for *by the same person*, as all the same writs are when issued into *another county*, so that now and henceforth, when a writ is issued from and returnable in the *Court of King's Bench*, the same is in all cases to be *signed* by the *signer* of the writs at the King's office at the bottom of King's Bench Walk. (*p*)

If the writ be from the *Common Pleas*, it must, as heretofore, of whatever name or description, without distinction, be *signed* either by the *Filacer* in Elm Court, Temple, or at the Chief Justice's Chambers, according to the county into which the writ is to be issued. (*q*)

When either of these writs is from the *Exchequer* it is to be *signed* by *one of the masters and prothonotary* of that Court or his deputy in attendance at 9, Old Square, in Lincoln's Inn, in the name of the chief clerk of the pleas. (*r*) The practice of Exchequer as to proceedings there in outlawry will be presently considered.

The fee to be paid for *signing* is fixed by the rule Mich. T. 3 W. 4, to be *2s. 6d.* in all the Courts. In the King's Bench, in a bailable action, the affidavit of debt is usually sworn before the officer who signs the writ, and at the same time, (*s*) though it may be previously sworn in Court, or before any judge, or before a commissioner in the country. When sworn before the officer who *signs* the writ, he is to be paid one shilling for the same. In all cases the *affidavit* of debt, with the *præcipe* for the writ, *must be produced to the proper officer* before the writ is signed, and is immediately to be left with and filed by him before a

(*p*) 3 & 4 W. 4, c. 67, repealing pro tanto 2 W. 4, c. 39, and rule K. B. 3 W. 4.

(*q*) Impey's Prac. C. P. 6 edit. 85; 2 W. 4, c. 39, s. 1, viz. the *filacer* is appointed by the chief justice, and is now Mr. Best, at the chief justices's chambers, and who acts as *filacer* for Cumberland, Devon, Exeter, Kingston upon Hull, Newcastle, Northumberland, York, Yorkshire, and Westmorland; and Mr. Rose and Mr. Jennings, No. 4, Elm Court, act as

filacers for and sign all writs into the rest of England. Rule III. 23 G. 3, r. 2, and see Arch. C. P. [21].

(*r*) Tidd, 72.

(*s*) *Howard v. Wilkins*, 7 Bar. & Cres. 783. If sworn in the country, it is sworn before a commissioner of the Court in which it is to be used. *Howard v. Brown*, 4 Bing. 393; and it may be sworn before a commissioner who is attorney, or agent, or clerk of the attorney of the plaintiff; rule III. T. 2 W. 4, r. 6.

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bailable writ can legally be issued. (t) In C. P. also the affidavit may be sworn before the filacer who signs the writ.

The *mode of signing* the writ in the King's Bench is by the signer of the writs writing his surname immediately under the concluding word in the writ, and in the Common Pleas by the filacer writing his name in like manner, and in the Exchequer by the master writing his surname. But it should seem that the *signing* of a writ is not so material as to render the omission an irregularity that can be taken advantage of; and provided a writ be *duly sealed*, the Court will not set the same aside, (u) because the signature of the filacer is a mere private mark for his own convenience and in order that information may easily be obtained at the office, as to who was the filacer who issued the writ, (x) and although the writ itself is signed by the filacer or other officer, yet it was held before the 2 W. 4, c. 39, that such name need not appear on the copy served. (y)

Twenty-fifth,
By what officer
each writ is to
be Sealed.

Twenty-fifth, Sealing of Writs.—*Original writs* issued out of the Court of Chancery, were not only in the king's name, but sealed with his *Great Seal*, but mesne process thereon always issued under the *private seal* of the particular Court, and not under the Great Seal, and are tested, not in the king's name, but in the name of the chief justice or chief baron of the particular Court. (z)

In the King's Bench and Common Pleas, after the writ has been signed, it is without any distinction as to the nature, description or name of the writ, to be taken to the *Seal Office* at No. 3, Inner Temple Lane, where the deputy sealer of the writs will seal the same on being paid sevenpence. (a) By rules of K. B. and C. P. no printed blanks or other writs are to be sealed before the same have been *regularly made out and filled up*, (b) and by other rules of those Courts no signable writs are to be sealed till they have been duly signed by the proper officer. (b) But there seems to be no such rule in the Exchequer, and there the practice in this respect differs materially, and writs *already sealed* in blank for names of parties and other particulars may be obtained from the bag bearer, or even from a stationer, and may be afterwards filled up and then

(t) 12 G. 1, c. 29, s. 2, *sec post*, chapter on *capias* as to the affidavit and necessity for filing the same.

(u) *Wilson v. Joy*, 2 Dowl. 182; 1 Legal Observer, 413, S. C.; *Burt v. Jackson*, 3 Moore & Scott, 553; 2 Dowl 747, S. C.; and see *Clutterbuck v. Wildman*, 2 Tyr. 276; as to a quo minus before 2 W. 4, c. 39, Tidd. Supp. 1833. 66, n.(c).

(x) Per Tindal, C. J. *id.*

(y) *Clutterbuck v. Wildman*, 2 Tyr. 276.

(z) 3 Bla. Com. 273, 282.

(a) R. M. 3 W. 4. s. 2.

(b) Tidd, 9 ed. 54; but the 6 G. 1, c. 31, s. 53, there referred to, only applies to sheriff's warrants.

signed by one of the masters or his deputy, and in addition to the same fees of 2s. 6d. for signing, and 7d. sealing, 1d. is to be paid for the bag bearer procuring the seal to be affixed, and 1d. to the stationer for the parchment and printing of the form. (c) This peculiarity in the practice of the Exchequer, however on principle objectionable, has been considered advantageous in facility and expedition, as it is essential in that Court only to take the writ to one office instead of two. In the King's Bench and Common Pleas the *sealing* of the writ is considered of principal importance, and is the act which completes its authenticity, (d) but it should seem that in the Exchequer the signature of the officer is substantially most important, because the writ is there permitted to be sealed before it has been filled up.

Twenty-sixth. Upon a review of these several proceedings and requisites the practical mode of issuing a writ appears to vary according to the nature of the writ, and in some respects, the Court out of which it issues. As regards a *writ of summons*, the plaintiff's attorney having received his *retainer* and *instruction* to sue, usually purchases from a law stationer a *writ of summons*, printed on parchment with blanks, in which he or an intelligent clerk must very carefully fill in the varying particulars, which we have seen are principally the christian and surname of the defendant and statement of his residence of place and county, the form of action, and at whose suit, carefully *repeating* the christian and surname of the plaintiff in each blank, the Court, and the day on which the writ is actually issued; and therefore the blank for the same should never be filled up until the instant before the writ is to be signed, and at the office of the signer of the writ; the practitioner may also, in the first instance, fill up all the proper indorsements, excepting the date of serving the writ or of the arrest, which must necessarily be left in blank until the copy has been actually served on the defendant. The plaintiff's attorney then prepares the proper *præcipe*, the form of which we have considered; (e) and takes such writ and *præcipe*, and in bailable actions the affidavit to hold to bail, and, if not already sworn, the intended deponent, *to the proper officer for signing* such writ, and who, on payment of his fee, *signs* his name and receives and files the *præcipe* and affidavit. The practitioner then

Twenty-sixth.
The practical
proceedings
upon issuing
process in ge-
neral.

(c) Price's Prac. of all the Courts, 27. 552; 2 Dowl. Pr. C. 747

(d) *Burt v. Jackson*, 3 Moore & Scott, (e) *Ante*, 220.

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takes the writ thus signed to the *Seal Office*, if the writ be issued from K. B. or C. P., where the proper officer *seals* the same on payment of his fee. (f) In the Exchequer we have seen that the writ is usually sealed in anticipation. (g) The attorney then fills up at least as many blank writs of summons, printed on paper, as there are defendants, and which must be *exact copies* of the principal sealed writ, and one *very exact copy* of which must be delivered to each defendant immediately after the service of the writ of summons or arrest on a *capias*. A very small variance between the original writ and the copy delivered would be fatal, as the omission of the *s* in sheriffs. (h) The writ and copy or copies being thus complete, both are usually delivered to an intelligent clerk for him therewith to serve the defendant or defendants, or if the process be a bailable *capias*, it is taken to the office of the undersheriff of the proper county, who on receiving the principal signed and sealed writ issues his warrant to one or more officers of the sheriff, who will receive from the attorney or the plaintiff himself a very particular description of the defendant, so as to secure the arrest of the proper party.

In issuing a *writ of capias*, it will be observed that the proceeding is nearly the same as in issuing a summons, excepting that it is *preceded* with the *affidavit to hold to bail*, which, whether *previously sworn* in the country before a commissioner, or in Court, or before a judge, or *to be sworn* before the signer of the writ, is, with the writ of *capias* and *præcipe*, to be taken to the proper signer of the writ and delivered to him with his proper fee before he signs, and he then, or afterwards, perhaps at his leisure, files the *præcipe* and *affidavit*. The writ is then to be sealed the same as the writ of summons, and the attorney having made perfect copies, then proceeds to the proper office of the undersheriff in London, or forwards the writ and copies to an agent in the country. At the undersheriff's office a *warrant* is then obtained, directed in general to one of the regular bailiffs or officers of the sheriff, and delivered to such officer, who thereupon receives particular instructions descriptive of the defendant, and proceeds to make the arrest.

Twenty seventh,
Consequences of
nonobservance
of requisites of

Twenty-seventh, Consequences of Mistakes, &c.—The statute 2 W. 4, c. 39, and its schedule, although it prescribes that *certain forms shall be observed*, is in its own terms silent as to

(f) *Ante*, 224.

(g) *Id.*

(h) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Nichol v.*

Boyn, 10 Bing. 339; *Smith v. Pennell*, 2 Dowl. 654; *Street v. Carter*, 2 Dowl. 671; but see *post*, 232.

the *consequence* of *nonobservance*. But sect. 14, authorized the judges or a majority, including the chiefs of each Court, to pronounce general rules for the *better enforcing* the provisions of the act, and accordingly the judges, by their general rule Mich. T. 3 W. 4, r. 10, ordered, "that if the plaintiff or his attorney shall omit to *insert or indorse* on any writ or copy thereof, *any of the matters required by the said act*, (2 W. 4, c. 39,) to be by him *inserted* therein or *indorsed* thereon; such a writ or copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue or to any judge."

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mesne process prescribed by 2 W. 4, c. 39, and rules thereon. Rule 10, Mich. T. 3 W. 4, declaring omissions to be irregularities but not to render writ void.

The general rule Hil. T. 2 W. 4, rule 33, orders that no application to set aside *process or other proceedings* for irregularity shall be allowed unless made within a *reasonable time* (even in vacation), (i) and even in an action against a prisoner, who is entitled to no particular indulgence in this respect, (h) nor if the party applying has taken a fresh step after knowledge of the irregularity; (i) and it should seem that in general every motion or summons on account of any defect in a writ of summons, or *capias*, or copy, or service thereof, actually served on or made known to the defendant, should be made *within the eight days* allowed for appearance or bail above, or at least within eight days after his *first knowledge* of the process, and at all events before he has entered his appearance or put in bail above. (l) It has been held that it sufficed to make the application in respect of the irregularity in six days after the delivery of the copy of the writ to the defendant. (l) But as regards a *distringas*, it has been decided that *eighteen days* after the service thereof was a very unreasonable delay, in objecting to the irregularity of the indorsements thereon, unless the defendant could shew that he could not come earlier. (m) And where the defendant had been served with a writ on 25th October, 1834, it was decided that a motion to the Court to set aside the proceeding for irregularity, made on the 3d November following, was too late, and should have been made at latest on the 1st November, and therefore the rule was discharged, with costs. (n) And if the irregularity occur in vacation it should be taken immediately, and the party must not wait till the term and then move the Court. (o)

But application must be made in due time.

(i) *Elliston v. Robinson*, 2 Cr. & M. 343; *Gurney v. Hopkinson*, 3 Dowl. 189.

(k) *Primrose v. Baddeley*, 2 Crom. & M. 468.

(l) *Smith v. Pennell*, 2 Dowl. 654

(m) *Wright v. Warren*, 3 Moore & S.;

Tidd, 71.

(u) *Tyler v. Green*, Exch. Mich. T. 1834, 9 Legal Obs. 173

(o) *Lewis v. Davison*, 3 Dowl. 272; ante, 22 (a).

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But where a writ was in trespass and indorsed for a *debt* and served on 4th October, 1833, and the declaration was in *trespass on the case upon promises*, and was delivered on 29th October, upon a rule for setting aside the *proceedings* on the ground of *variance* between the writ and declaration, the Court set aside the *writ* as well as the *declaration*, saying that the objection, on the ground of variance, did not arise until the declaration was delivered, and that objection affected both the writ and declaration. (*p*) And in proceeding to outlawry, where the irregular *capias* had been filed, the Court held that the defendant ought to have objected within a reasonable time after he might have searched, and that it was too late afterwards to object, though as soon as the defendant had actual notice of the outlawry. (*q*)

The objection must not only be taken within a *reasonable time*, but it must be *effectually* so taken; and if a judge should even erroneously refuse to give effect to the objection, it will be too late at any subsequent stage; as where a judge had refused to discharge a defendant arrested on a *capias* in an action irregularly described to be "*trespass on the case on promises*, and after such refusal he executed a bail bond and put in bail above, and the bail then moved the Court to set aside the *capias*, the Court admitting that the writ was irregular, nevertheless refused to interfere, saying it was too late; (*r*) the proper course would have been, upon the first refusal of the judge, to have applied to the Court. The Courts and judges have so frequently expressed their disapprobation of objections of this technical nature, and their satisfaction when they are defeated, (*s*) that a question naturally arises, then why are such trifling objections suffered to have effect? The answer, is, that when the legislature have explicitly declared that it is important to observe certain forms and *uniformity* in mesne process, the judges are obliged, in order to secure observance of the regulations, to enforce them strictly in individual cases.

It has been truly observed that the object of the judges in promulgating the above rule of Mich. T. 3 W. 4, 1832, was not to *create* or *increase* objections to process or to render them *more fatal* than they would otherwise have been, but rather to *prevent* the defendant from treating the writ or proceeding as

(*p*) *Edwards v. Dignam*, 4 Tyr. 213.

(*q*) *Lewis v. Davison*, 3 Dowl. 274.

(*r*) *Gurney v. Hopkinson*, 3 Dowl. 189.

(*s*) See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 566; *Gurney v. Hopkinson*, 3 Dowl. 193.

altogether *void*, and in bailable cases, perhaps *bringing an action* of trespass for an arrest or proceeding under the irregular process, for if it had not been for that general rule, process framed differently to the form prescribed by statute might have been absolutely *void*; (t) but at the same time the defendant is allowed by the rule to apply to set aside the writ or copy, if the Court or judge should deem such omission an irregularity. (t) It must be kept in view that the rule of Mich. T. 3 W. 4, is strictly confined to *omissions*, and that therefore the judges are not precluded from making rules for the *addition* of any other matters in improvement of process or the indorsements thereon, and in exercise of that power, it will be remembered that the judges, by the rule 5 of Mich. T. 3 W. 4, required the amount of the debt and costs claimed to be indorsed on process when issued for a *debt*; and it would seem, that provided there be no *technical material omission* or *alteration* in the *sense* or *sound* (u) of either of the prescribed forms of writs or indorsements or of the memorandum of appearance, practitioners are still at liberty to *add* whatever they may think advisable; though as a general rule, it is safer closely to adhere to the forms as prescribed by the statute 2 W. 4, c. 39, even to a letter.

We have seen that the general rules to be observed in practice have either been prescribed by particular *statutes*, or by *all* the Courts, or by one Court in *particular*. When prescribed by *statute*, (as in the forms in the uniformity of process act, 2 W. 4, c. 39,) they *must* be *strictly* observed, or the process or other document, defective in any respect *technically* considered *material*, may, on motion or summons, provided it be made *in due time*, (i. e. in general within the eight days allowed for entering the appearance or putting in bail above,) be set aside; and in the earliest cases, after the 2 W. 4, c. 39, and rule Mich. T. 3 W. 4, thereon, it was considered that any argument that the defect could not mislead or was not in matter of substance tenable, because the *expediency* of the regulation was matter for the consideration of the *legislature*; and having been *enacted*, Courts of justice collectively and judges individually

What Deviations fatal.

(t) Per Bayley, B. in *Price v. Huxley*, 2 Crom. & M. 211; 2 Dowl. 232; 1 Arch. C. P. [23].

(u) It will be observed that in one of the earliest cases on the statute that was the rule adopted and laid down by the Court of K. B. and the contradiction in the cases has only been in the *application*

of that rule to each particular case. See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565, 6. In that case the Court *misapplied* the rule by holding that the omission of the *t* in *Middlesex* was material and altered the sense. See *Colston v. Berens*, 3 Dowl. 253, where the Court of Exchequer held the omission *immaterial*.

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are bound to give it effect, by setting aside every proceeding that deviates from the prescribed form to an extent even *technically material*. And that much laxity, doubt, uncertainty, and confusion in practice, has arisen from allowing nice and refined distinctions between what prescribed requisites shall be holden merely directory and what *imperative*, and that attempted distinctions tending to make a rule nugatory ought to be denied. (u) And it has been observed, that when Courts begin to decide upon nice and evanescent distinctions infinite trouble and uncertainty is occasioned. (x) At first, the Courts, perceiving the encouragement to indolence and want of due care in practitioners in not adhering to prescribed forms, were even more strict than formerly, as regards objections of this nature, in the expectation that more uniformity and certainty in practice would ere long be established. (y) This result may be collected from the numerous decisions already noticed, but it may nevertheless be expedient here to give a combined view of the leading decisions even at the risk of repetition.

Where a defendant was detained on a pluries capias, in which a blank was left for his place of residence, contrary to the form No. 4 in the uniformity of process act, 2 W. 4, c. 39, (z) and also where the residence was *indorsed* instead of being *incorporated*, (a) the Court, in the first case, set aside the service, and in the last the bail bond, declaring "that it is much better for the public to adhere in all practicable cases to the strict, close, *literal compliance with the forms prescribed by the act*, rather than to yield to particular cases of supposed hardship on individuals when those requisites have not been properly complied with;" (b) and this, even in a case where it was sworn that the reason why the defendant's residence, mentioned in the antecedent process, was not continued in the pluries capias was, that the defendant had removed and it was not known where. (b) So, as respects the *form* of action, although it was formerly considered that "trespass on the case upon promises" was the correct technical description of an action of assumpsit, yet as the 2 W. 4, c. 39, gives the form "action on *promises*," the introduction of the words "*trespass on the case upon promises*" would be a false irregularity, although not an *omission* within the meaning of rule 10 of Mich. T. 3 W. 4;

(u) Per Taunton, J., in *Ryley v. Boissomus*, 1 Dowl. 383; *Tomkins v. Chilcote*, 2 id. 187.

(x) Per Williams, J., in *Rex v. Newton*, 1 Adol. & Ellis, 244.

(y) *King v. Skeffington*, 3 Tyr. 318.

(z) *Roberts v. Wedderburne*, 1 Bing. N. C. 4.

(a) *Lindredge v. Roe*, 1 Bing. N. C. 6.

(b) Per Tindal, C. J., in *Roberts v. Wedderburne*, 1 Bing. N. C. 6; and see *Price v. Huxley*, 1 Crompt. & M. 211.

and it should seem that the Court would not reject the objectionable words as superfluous as might have been hoped; (c) and although in one case the Court said, that a *capias* directed to the sheriff of London instead of sheriffs might suffice, yet that as the 2 W. 4, c. 39, s. 5, requires that the party arrested shall have a *copy* of the writ delivered to him, if the supposed copy were sheriff and the writ sheriffs the variance would be fatal. (d) This last decision appears to require even more exactness in the *copy* of the process than in the process itself, and seems to negative the distinction whether the deviation be *material*, for whether the word were sheriffs or sheriff, or Midsex or Middlesex, it should seem that the defendant could not well be misled or prejudiced by the mistake, for the mistake in the name of the sheriff was not connected with any thing the *defendant* was required to perform. Where the copy of a *capias* delivered to the defendant upon his arrest omitted the teste or date, that omission was holden fatal. (e) And in a later case it has been decided, that if a writ of *capias* be directed to the sheriffs instead of sheriff of Middlesex, it is fatal. (f)

Still, however, the Courts have established a *general exception* to the rigid rule, viz. that if the *sound, or sense, meaning* of the writ or copy, or an indorsement thereon, has not been altered by the *omission* or other mistake, then the deviation from the prescribed form will not constitute an irregularity to be objected to with effect, (g) and the only difficulty is *in the application of that principle to particular cases*. It is admitted that the Courts have in some of the earliest cases after the passing of 2 W. 4, c. 39, decided mistakes to be material when they should have been decided otherwise. (g) Thus, the omission of immaterial participles in either the writ or copy, not altering the sense or meaning, is not an irregularity of which the Court will take notice; (h) and, therefore, where in the *copy* of a *capias* served on the defendant after his arrest, the word “*the*” before “*date*” and the word “*by*” before “*any judge*” were omitted in the usual form of the *capias* itself, the Court refused to discharge the defendant out of custody, though it was argued that the legislature intended that

Mistakes, not altering the sense, meaning, or sound, now holden immaterial.

(c) *King v. Skeffington*, 1 Crompt. & M. 363; 1 Dowl. 686; *Gurney v. Hopkinson*, 3 Dowl. 189.

(d) *Byfield v. Street*, 10 Bing. 27; *Nichol v. Boyn*, 10 Bing. 239; 1 Arch. K. B. 4 ed. 140; *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564; and see *Sutton v. Burgess*, ante, 186, 187, and post, 232 (n).

(e) *Perring v. Turner*, 3 Dowl. 15.

(f) *Barker v. Weldon*, 1 Cr. M. & R.

396; *Jackson v. Jackson*, id. 438.

(g) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536; *Colson v. Bereas*, 3 Dowl. 253; and *Sutton v. Burgess*, post, 232, admitting the principle in *Hodgkinson v. Hodgkinson*, but denying its application in that case; and see *Forbes v. Mason*, 3 Dowl. 104.

(h) *Forbes v. Mason*, 3 Dowl. 104, and see the cases in the next note.

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the prescribed form should invariably be adopted, and that no exertion of intellect should be required on the behalf of persons served with process to ascertain whether or not the deviation was material; and Tindal, C. J. said, the *meaning* of the writ is not altered by these omissions; and therefore the copy is unobjectionable, and the other judges concurred; (i) one of whom observed, that if the copy served should omit the cross to a *t* in a word in the writ it might as well be insisted that it was not a *strict copy*; (k) and in another case it was observed, that bad spelling will not prejudice unless it *alter the sense*, as if in the word *sheriff* one of the *f*'s should be omitted, that would not constitute a fatal irregularity; (l) and though we have seen that where the *l* had been omitted in Middlesex, that was deemed a fatal irregularity; (m) yet, in more recent cases, the Court of Exchequer treated that decision as erroneous, because the omission of the *l* did not alter the sense nor could mislead any defendant; (n) and in the last case, although the copy of the *capias* delivered to the defendant after her arrest was thus: "take Marian Burgess if *h* (instead of '*she*') shall be found in your bailiwick, &c." the Court discharged with costs a rule nisi for cancelling the bail bond, saying that the inaccuracy did not alter the sense. (o) So where the copy of a summons described the defendant by the name Andrew Bryon, though the writ itself was Andrews Bryan, the Court held the variance immaterial. (p) And upon a motion to set aside the service of a writ of summons against J. F. Partridge, on an affidavit that the defendant's real name was John Charles Partridge, and that he never signed any document by the name of J. F. Partridge; on shewing cause, a bill of exchange was produced signed with ambiguous initials before the surname Partridge, and an affidavit of two persons was produced swearing that they read the signature as J. F., Lord Abinger said, the document shews that the defendant makes his *C*'s like other men's *F*'s, and if men will write so ambiguously they must take the consequences, and the rule was discharged. (q) And the most recent publications on practice have drawn the conclusion that it is

(i) *Pocock v. Mason*, C. P. Mich. T. 1834, 2 Bing. N. C. 245; and *Legal Observer*, 7 Dec. 1834; *Forbes v. Mason*, 3 Dowl. 104; and see *Tyser v. Bryan*, 2 Dowl. 640. The case of *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536, to the contrary was overruled by *Colson v. Berens*, 3 Dowl. 253.

(k) *Forbes v. Mason*, 3 Dowl. 101.

(l) *Nicol v. Boyne*, 10 Bing. 339; 3 Moore & Scott, 812; 2 Dowl. 762.

(m) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536, S. C.

(n) *Colson v. Berens*, 3 Dowl. 253; and see *Sutton v. Burgess*, Exchequer, 21st January, 1835, per Parke, B., and Alderson, B., Mr. Tyrwhitt's MS.

(o) *Sutton v. Burgess*, *supra*, note (n).

(p) *Tyser v. Bryan*, 2 Dowl. 640.

(q) *Dennis v. Partridge*, Exch. January 21st, 1835.

only in *material* deviations that the defects will be treated as irregularities. (r) The term *material*, however, has been so *technically* construed as in some cases to give effect to objections which in *ordinary acceptance* would be considered *immaterial*, for who but a lawyer would consider that the omission or addition of an *s*, in the description of the sheriff of Middlesex or sheriffs of London, can be material as respects the defendant, more especially as it is a maxim in law that Courts are to take notice *ex officio* of the division of England into counties, and not even a lawyer could doubt the county intended? (s) The result, therefore, seems to be, that although the Courts are now indisposed to give effect to summons or motions on account of mistakes, that have not altered the *sense* or *meaning* of process nor *could have misled* the most ignorant person, yet, unless in the clearest cases, it will be found most judicious to abandon any objectionable process and proceed *de novo*.

Twenty-eighth, Of Amendments before executed.—If a mistake or irregularity be discovered in the writ *before it has been executed* it seems that it may as of course, without obtaining the leave of the Court or a judge, be amended, and afterwards even twice *resealed*; and this, although between the first and subsequent sealing the statute of limitation had run, (t) nor is it necessary to prove the time of resealing; and before the 2 W. 4, c. 50, this might have been done even after the defendant had been served, (u) provided a term had not intervened between the teste and the altered return day; (v) and it seems that by the present practice a writ may be altered and re-sealed *before* it has been *served or executed* without any order of the Court or a judge, but if altered without being resealed, the Court or a judge would set aside the proceeding on payment of the debt without costs, or the writ might be treated as a nullity, (w) unless, perhaps, in cases where a statute of limitations would bar the remedy, when, if the writ issued before the statute had completely operated should afterwards be amended, it would have retrospective validity *nunc pro tunc*; and where a writ of summons, tested in time to save the statute of limitations, was resealed, in consequence of an alteration in the description of the

*Twenty-eighth,
Of amending
and resealing a
writ before
executed.*

(r) *Freeman v. Mason*, Mich. T. 1834, C. P.; 9 Legal Observer, 109; T. Chit. Arch. K. B. 4 ed. 112, 123, 513, 517, 518, 530, 532; and 1 Arch. C. P. [23].

(s) 2 Inst. 557; March's Rep. 124; Rex v. Greep, Comb. 463.

(t) *Braithwaite v. J. d. Mountford*, 2 Cr. & M. 408; 4 Tyr. 276, S. C.

(u) *Israel v. Middleton*, 1 Chitty's Rep. 321; *Anon. id.* 398.

(v) *Durden v. Hammond*, 1 Bar. & Cres. 111; 2 Dowl. & R. 211, S. C.

(w) *Siggers v. Sanson*, 3 M. & Scott, 194; 2 Dowl. 746, S. C.; *Anon.* 2 Chitty's Rep. 237; *Taylor v. Phillips*, 3 East, 155.

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Notice to de-
fendant not to
appear when
prudent.

defendant and the county in which he resided, and was not served until after the six years had elapsed, it was decided that the resealing did not amount to a re-issuing of the writ and that it was not necessary for the writ to shew when the resealing took place;(x) but if the name of one county for another be substituted without resealing, the Court will set aside proceeding for irregularity and without costs, notwithstanding the defendant obtained an order to stay proceedings on payment of debt and costs, and the Court observed that the attorney in so altering the writ had been guilty of *gross misconduct*.(y)

If serviceable process has been executed by service of the copy upon the defendant and a material defect be discovered, and it be apprehended that the defendant will take advantage of the irregularity, then the safest and least expensive course is to serve a written notice on the defendant not to appear and that the writ or the service is abandoned;(z) after which, in case the defendant should move the Court or take out a summons to set aside the proceeding for irregularity, the Court or a judge would refuse and discharge the application,(a) and after service of such notice the plaintiff might proceed de novo if the writ were defective, or serve a fresh copy if the defect were merely in the service.(b) The form of notice in the note may be applied to each case as circumstances may vary.(b) A similar notice might be given where the defect is in bailable process or in the copy thereof delivered to the defendant.

Twenty-ninth,
Of amendments
of writs or copies

Twenty-ninth, Of Amendments after executed when not allowed.—Before the uniformity of process act, 2 W. 4, c. 39, the

(x) *Braithwaite v. Ld. Mountford*, 2 Cr. & M. 408.

(y) *Siggers v. Sansom*, 3 M. & Scott, 194; 2 Dowl. 745.

(z) See forms, *infra*, note (b).

(a) Tidd's Sup. 65; Chitty's Summary, 30; 4 Man. & R. 100.

Form of notice
to defendant not
to appear to
process dis-
covered to have
been irregular.

(b) In the King's Bench (or "Common Pleas" or "Exchequer.")

Between { A. B. plaintiff,
and
C. D. defendant.

Take notice, that as a defect has been discovered in the writ of summons (or capias) issued in this cause, (or "in the copy of the writ of summons (or capias) served on you,") the plaintiff hereby abandons the said writ (or "abandons the service of the said copy"), and that until further notice the plaintiff will not take or require you to take any further proceedings in this cause, and you are not to appear (or "put in bail above"), nor are you to take any proceedings to set aside the said writ or the service thereof, or the copy of the same, and if you have incurred any necessary expense the plaintiff will immediately, on being informed thereof, pay the same. Dated this — day of —, A. D. 1835.

To Mr. C. D. the above
named defendant.

E. F.
plaintiff's attorney.

See another form, Tidd's Appendix, chap. ix. s. 4; and T. Chitty's Forms, 698; Imp. K. B. 494; 4 Man. & Ry. 100.

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*after executed
and when not
allowed.*

Courts frequently permitted amendments of mesne as well as final process, upon payment of costs, (though in general not so as to affect bail,) and it was frequent, when a defendant had obtained a rule nisi for setting aside process for irregularity, for a plaintiff's counsel to move for and obtain a cross rule for leave to amend, and the respective rules came on to be heard at the same time; (c) and a *capias ad satisfaciendum* is still frequently amended. (d) *And unquestionably the Courts still have jurisdiction and power to permit amendments in all cases,* (e) and they will exercise it when great injury would otherwise ensue, as where it would be too late to commence a fresh action; (f) but, as a rule of practice, all the judges have, in order the better to compel the observance of the directions in the uniformity of process act, come to a resolution not to permit, after process has been executed, any amendment of irregularities contravening the forms *prescribed by that act*, (g) excepting in cases where a statute of limitation would otherwise bar the remedy, (h) when the Court will permit such amendments. (i) Nor will they permit amendments even of mistakes in a mere matter of *fact*, as in the name of a defendant (k) or plaintiff. (l) But when the defect is merely in the nonobservance of some matter, enjoined only by a *rule of Court*, a less strict practice in allowing an amendment prevails. (m) When the deviation is from the forms enjoined by the *statute*, they consider they have no discretion but must enforce the enactment; but that a departure from or nonobservance of a rule made by the judges themselves ought not to be so rigorously punished. (n) Thus the indorsement of the debt claimed and costs is not required by 2 W. 4, c. 39, but only by the rule Mich. T. 3 W. 4, A. D. 1832, r. 5, and, therefore, if omitted or imperfect the Courts now in general permit the plaintiff to amend on payment of costs and allowing

(c) See authorities cited in *Byfield v. Street*, 10 Bing. 27; *Inman v. Huish*, 2 New Rep. 133; *Marsh v. Blachford*, 1 Clitty's Rep. 323; *Bradshaw v. Davis*, *id.* 374; *Wakeling v. Watson*, 1 Tyr. 377.

(d) *McCormack v. Melton*, 3 Nev. & Man. 881.

(e) Recently the Court permitted the amendment in the teste of a writ of *certiorari* from vacation unto the preceding term, although the judgment of an inferior Court had thereby been irregularly removed; *Rowell v. Breedon*, 9 Legal Observer, 299, 300.

(f) *Ante*, 173; *Horton v. Borough of Stamford*, 1 Crompt. & M. 773; 2 Dowl. 96, S. C.; *Baker v. Neave*, 3 Tyr. 233.

(g) Per Parke, B., *Easter T.*, 1834, 1 Arch. C. P. [23]; *Hodgkinson v. Hodg-*

kinson, 3 Nev. & Man. 565; *Jakin v. Massie*, 4 Tyr. 839; *Colson v. Berens*, 3 Dowl. 253.

(h) *Ante*, 173; but the Courts permit amendments of *ca. sa.* and other final process; *McCormack v. Mellor*, 1 Adol. & El. 330.

(i) *Horton v. Stamford*, 3 Tyr. 868; *Jakin v. Massie*, 4 Tyr. 839.

(k) *Ante*, 173.

(l) *Ante*, 200.

(m) *Urquhart v. Dick*, 3 Dowl. 17; *Colles v. Morpeth*, *id.* 234; *Shirley v. Jacob*, 5 Moore & S. 67; 3 Dowl. 101, S. C.; *Hooper v. Walker*, 1 Crompt. M. & R. 437; 3 Dowl. 167, S. C.; *ante*, 213.

(n) *Cooper v. Walker*, 3 Dowl. 167.

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the defendant four days for paying the debt and costs if he think fit; (o) and where a motion had been made to cancel a bail bond on an objection of that nature, Parke, B. stated that he had conferred with the judges of the other Courts and they thought it proper that a plaintiff in these cases should have leave to amend, and that he should be allowed to shew the amendments as cause against the rule for setting aside proceedings and which would be accordingly discharged upon payment of costs, the defendant being allowed four days from the time of the amendment to pay the debt; and it was recommended by the Court that notice to that effect should be given to the plaintiff's attorney that no further proceedings should be had if he would take out a summons to amend, and pay the defendant his costs, occasioned by the irregularity, up to that time, but that if he refused to do so, then the rule as prayed was to be drawn up. (p)

Consideration whether there is any and what difference between a defect in a writ or in a copy.

A distinction was at first taken between the mistake in the copy of the writ served upon the defendant, and a mistake in the writ itself, upon the supposition that the latter was the act of the Court itself but the copy merely the act of the defendant, and that although possibly the Court might permit an amendment in the writ as being its own act, no such amendment could be admitted in a copy. (q) But as the writ and copy are alike prepared in the office of the plaintiff's attorney without any interference of the Court or even one of its officers, (excepting the mere acts of signing and sealing,) there is not on principle any such distinction. (r) And certainly in practice no such distinction now prevails, and a mere mistake in spelling in the copy, not altering sense or sound, is not now material; (s) and Vaughan, B. observed, that if the cross to a *t* of the "the" in the writ were omitted in the copy it could not strictly be a copy, but still could such an omission be treated as a fatal irregularity? (s)

Thirtieth, When and how to object to writ or copy and of motions and summons and for irregularities, and when and how to be made. (t)

Thirtieth, Of objections to writ, &c.—If the copy of the writ delivered to the defendant be defective, he may reasonably suppose that the writ corresponds and is equally defective, and may with propriety, unless he has previously ascertained that the writ is perfect, move or obtain a summons to set aside as

(o) *Cooper v. Walker*, 3 Dowl. 167; *Shirley v. Jacobs*, 5 Moore & S. 67, 68.

(p) *Cooper v. Walker*, 3 Dowl. 167.

(q) *Byfield v. Street*, 10 Bing. 28; 2 Moore & S. 812; 2 Dowl. 739, S. C.

(r) Per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565.

(s) *Forbes v. Mason*, 3 Dowl. 104; and as to misspelling in a copy see *Nicol v. Boyn*, 10 Bing. 340, 341; and see *Tyser v. Bryan*, 2 Dowl. 640.

(t) See *post*, as to irregularities in general.

well the *writ* as the *service* of the *copy*.(u) But if the service be regular and only the writ itself irregular, then the application should be merely to set aside the writ.(u)

And in some cases, although an irregularity may have already occurred, yet if the same be afterwards *repeated* or *continued* in a subsequent stage, it may suffice then to take the objection, and therefore although a writ "in an action of *trespass*" having been indorsed for a *debt* of 11*l.* 12*s.* 9*d.* might have been objected to immediately, yet if the plaintiff afterwards *declare* in *assumpsit*, it is not then too late to move to set aside the proceedings.(x) It is considered better here only to advert generally to the necessity for immediate activity of a defendant on his first knowledge of process having been issued, and to consider the subject of *motions and summons* on account of *irregularities* in a subsequent separate chapter.

With respect to the *time* within which the application to set aside the proceedings for *irregularity* should be made, the *general long established practice* of the Court requires the application to be made *promptly*, so as to prevent an increase of costs, and the rule 33 of Hil. T. 2 W. 4, expressly requires the motion for an irregularity to be made within a *reasonable time*.(y) And it should seem that the motion or summons on account of irregularity in a writ, or copy, or service, should be within the *eight days* allowed for entering the defendant's appearance or putting in bail above. The rule 10 of Mich. T. 3 W. 4, also authorizes the application to the Court or a judge, and a judge has therefore jurisdiction to interfere in *vacation*, and when an irregularity is discovered in vacation a summons must be promptly obtained, and before the party objecting has himself taken a fresh step after notice of the irregularity.(z) But where the plaintiff had improperly indorsed on the summons a larger sum than was due, the Court, even after improper delay on the part of the defendant, on motion, stayed the proceedings on payment of the debt and all costs incurred up to the time of the motion, but without paying the plaintiff's costs of the motion; (z) and if a declaration be delivered on 24th October, thereby shewing an irregularity in an indorsement on the writ of the debt claimed, the defendant should take out a summons immediately within eight days, and before the 1st November following.(z) As

Time for application.

(u) *Hasker v. Jarman*, 1 Dowl. 655; *Cohen v. Watson*, 3 Tyr. 238; *Border v. Levi*, 3 Dowl. 150.

(x) *Edwards v. Dignan*, 2 Crompt. & M. 346; 4 Tyr. 213, S. C.

(y) *Ante*, 227.

(z) Per Bayley, B. in *Elliston v. Robinson*, 2 Cr. & M. 345; 4 Tyr. 214; *ante*, 227.

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respects the *mode* or *form* of taking the objection, it would seem that if the irregularity be confined to the writ, then the motion or summons should be to set aside only such writ; and in one case where the writ was irregular, but the service was regular, and the defendant moved to set aside the *service* for irregularity, the Court discharged the rule. (a) So where the defendant must be aware that the writ is sufficient, and that the copy delivered or the service thereof alone is irregular, then perhaps his motion or summons should only be to set aside the latter. But in general, when the copy delivered is defective, the defendant may reasonably suppose that the writ itself may correspond, and he may therefore fairly apply to set aside *both*, and although the writ afterwards appear sufficient but the copy is defective, the defendant's application will succeed *pro tanto*. (b) It seems therefore to be advisable in general, when the copy delivered is insufficient, to apply to set aside the writ and copy and service, unless it has been previously ascertained that the writ itself was sufficient, in which case, if the rule should require too much, the Court might refuse costs.

It is usual when there is an omission in the writ or copy served to draw up the rule nisi for cancelling the bail bond or discharging the defendant out of custody, or setting aside the writ or service for a defendant to make it part of the terms "*on his entering a common appearance*," which, if accepted, would preclude the plaintiff from commencing a fresh action or arresting him again; but this is entirely optional, and even the Court could not without the defendant's consent order such appearance; (c) nor if offered by the defendant is the plaintiff bound, at least in a bailable action, to accept such common appearance, for he might resolve to arrest the defendant in a fresh action. (c) But in order to arrest again, an application at Chambers should be made for leave to arrest a second time, and the plaintiff must first discontinue his former action. (d)

Thirty-first,
Preparing to
serve or execute
the writ.

Thirty-first, The intended writ having been duly *filled up* on *parchment*, and *signed* and *sealed*, and a *præcipe* thereof left at the proper office, and all the *indorsements* to be made antecedent to service or execution having been properly filled

(a) *Hasker v. Jarman*, 1 Dowl. 654; and see *Cohen v. Watson*, 3 Tyr. 238; Tidd, Supp. 1833, p. 75.

(b) *Hasker v. Jarman*, 1 Dowl. 655.

(c) *Perring v. Turner*, 3 Dowl. 15, 16, and *Jackson v. Jackson*, 3 Dowl. 182, as to a second arrest.

(d) *Jackson v. Jackson*, 3 Dowl. 182.

up, the plaintiff's attorney should make at least as many fair and *exact copies* of the whole, (without contractions, upon paper, and which are usually printed,) as there are defendants, so as to serve and leave with each defendant one copy of such process. Indeed, it seems prudent to make and carefully examine at least one copy of the writ *more* than may be required to be served, so as to have the same ready to be annexed to and verified by any affidavit that may afterwards arise, and it would even be advisable to file in the attorney's office an examined copy in every cause. In serviceable process, as a writ of summons, the person who is to serve each copy should keep the original and all such copies until the latter* have been served. But in bailable process the original *capias* and the copies thereof are to be delivered to the undersheriff of the proper county, and after the warrant has been obtained, then to the officer who is to execute the process, so that he may have the same ready to produce to the defendant. (f)

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Thirty-second, The writ, whether serviceable or bailable, together with the copies, having been filled up and fully indorsed according to the preceding directions, and the writ itself having been duly signed and sealed, after the whole have been very *carefully examined* with each other and with the præcipe, are then to be *delivered* to be executed. If serviceable, then usually to a clerk of the attorney, but sometimes to an experienced officer, when any great difficulties in effecting a service are expected, and if bailable, the original writ and copies are to be taken to the office of the proper undersheriff of the county in which the defendant is to be arrested, in order that he may thereupon issue a warrant to one or more of the sheriff's officers or bound bailiffs, or sometimes to a person not a general officer of the sheriff, but particularly named *pro hac vice* by the plaintiff's attorney, and each will thereupon be executed as hereafter stated when we consider the proceedings by summons, *distringas*, *capias*, &c. separately. We have seen that the sheriff of every county is now bound to have an office of his undersheriff in the metropolis, or within one mile of the Inner Temple, to which all process may be taken, (g) and it is the duty of such undersheriff promptly to forward the process left at such office to a proper officer in the proper county there to be executed; so that it is not absolutely es-

Thirty-second,
The execution
of the writ by
service or arrest
in general.

(f) 2 W. 4, c. 32, s. 4.

(g) 3 & 4 W. 4, c. 42, s. 20, *ante*, 47.

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Defendant's
attorney's writ-
ten undertaking
to appear.

sential for a London attorney to employ any agent in the country, but still it is usual to do so when there is great anxiety to see that the officer immediately performs his duty without collusion with the defendant, which it might be difficult afterwards to establish so as to fix the sheriff.

In cases when it is not apprehended that the defendant will attempt to avoid the service or execution of the writ, if previously informed of the intention to issue the same, it is a usual and proper courtesy for the plaintiff's attorney, with the concurrence of his client, (*h*) to request the defendant to name his attorney, who will either *undertake to appear, or to obtain a sufficient bail bond, or to put in and perfect bail above*, so as to avoid personal annoyance and imprisonment, whilst the office is searched, and some extra expense. It is essential thereupon to require a *written undertaking* from such attorney, and which the Court would on motion enforce by attachment or strike him off the roll; (*i*) but they would not thus interfere unless the undertaking were *in writing and signed* by the attorney. (*k*) If an attorney give an undertaking to the *plaintiff or his attorney* to appear to a bailable action, he must perfect bail above or render the defendant, or be attached or struck off the roll, (*l*) and an undertaking of this nature need not state the consideration, for it is not an engagement within the meaning of the statute against frauds, 29 Car. 2, c. 3, s. 4, or at least it may be enforced by attachment. (*m*) It may, however, be advisable so to frame the undertaking shewing sufficient consideration as to enable the plaintiff to sustain an *action* thereon, in case the remedy by attachment should be defeated by death or otherwise. (*n*) But such an undertaking by an

(*h*) It is advisable to obtain *express* concurrence, for otherwise if the defendant should abscond, the plaintiff's attorney might be subject to an action at the suit of his client for his unfortunate liberality.

(*i*) Rule Mich. 1654; *Anonymous*, 6 Mod. 42; *Lorymer v. Hollister*, 2 Stra. 693; *Mould v. Roberts*, 4 Dowl. & Ryl.

719.

(*k*) *Lorymer v. Hollister*, 2 Stra. 693; *Lofft*, 192; *Stratton v. Burgis*, 1 Stra. 114; see further *post*. chap. vi.

(*l*) *Sedgworth v. Spicer*, 4 East, 569; *Rogers v. Reeves*, 1 Term R. 422.

(*m*) *Re Greaves*, 1 Crompt. & J. 374; *Re Paterson*, 1 Dowl. 469.

Form of under-
taking by a de-
fendant's at-
torney to the
plaintiff or his
attorney, to
put in or perfect
bail above.

(*n*) The following form is suggested.

In the Court of ——. A. B. plaintiff against C. D. defendant. In consideration of the plaintiff having at my request agreed not actually to arrest the above-named defendant in this action, (or "to allow the defendant to be released out of the custody of the sheriff of ——" in this action, without executing a bail bond with sureties,") I, as the attorney for and on the behalf of the said defendant, agree for myself and my executors and administrators with the said plaintiff to cause bail above in this action to be put in and perfected in due time, or a sufficient deposit in Court to be made pursuant to the statute, or the defendant to be duly rendered in due time, or that I will myself pay the debt and costs. Dated this — day of ——. A. D.

E. F. defendant's attorney,

attorney, if given to the *sheriff or his officer*, is considered contrary to the policy of the 23 Hen. 6, c. 9, as leading to extortion in consideration of the indulgence, and would therefore be void. (o)

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The 10th section of the 2 W. 4, c. 39, we have seen, enacts, *Duration of the writ and time within which it must be executed.*
 "That no writ issued by authority of this act (and extending to all the process to compel appearance or bail above therein enumerated) shall be in force for more than *four calendar months* from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith." The same section then provides for writs to save the operation of a statute of limitations, and prescribes the requisites of continued process. The 11th section relates, as we have seen, to proceedings on the process during the vacation, and excepting certain proceedings between the 10th of August and 24th of October, (p) and which seem only to suspend *declaration and pleadings*. The principal advantage resulting from the enactments, that writs shall be dated on the day when issued, and thus continue in force for four months, is, that the vexatious practice of issuing and charging a defendant for several successive writs, returnable on the day when issued, or very soon after, and as to render it scarcely possible to execute the first process before it was returnable, has now been put an end to, and it can scarcely be necessary to issue more than one writ, unless in cases where the defendant purposely evades process, when a *distringas* may properly issue.

The service or execution of process on a *Sunday* would we have seen be illegal and void. But a writ may be served, or an arrest made, or a seizure made under a *distringas*, at any *hour* of the day or night, though not at a time when the defendant is privileged by attendance on a Court of justice, when it would be irregular even to serve him with process. *Time of execution.*

With respect to the *place* where process is to be executed, there is less strictness in the service of a writ of summons than in executing a *capias* or *distringas*. Formerly, if the service, although actually out of the proper county, yet if it were on the confines, the Courts would not interfere to set the service *Place where to be executed.*

(o) *Sedgworth v. Spicer*, 4 East, 509; *Lewis v. Knight*, 8 Bing. 271.

(p) See sect. 11, *ante*, 152.

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aside, and there was much uncertainty respecting the term confines, or the distance out of the county that should be permitted; (q) and therefore to put an end to any uncertainty, the 1st section of 2 W. 4, c. 39, enacts, "that a writ of summons must be served in the county in which the defendant is therein described to reside or be, or within 200 yards of the border thereof," and which, according to a recent decision, are to be measured in a straight line or bird's flight, without regard to intervening streets, ways or objects.

With respect to writs of *capias* and *distringas*, they must be executed within the precise boundary of the county to the sheriff of which they are directed, or the arrest or distress would be void, and subject the sheriff and officer to an action of trespass. The 2 W. 4, c. 39, s. 20, however, provides, that when a district or place, part of one county is situated within, and surrounded by some other county, then for the purpose of the service and execution of *every* writ and process, whether mesne or judicial, such district or place shall be deemed and taken to be part as well of the county wherein such district or place is so situate, as of the county whereof the same is parcel, and every such writ and process may be directed accordingly, and executed in either of such counties. An outer door must not be broken in order to execute a *capias* or serve a summons; and although the house of a third person may be entered when the outer door is open, for the purpose of arresting a defendant who is found there, yet if he were not there the officer would be a trespasser, unless he have the license of the occupier to search.

Mode of Service
or execution of
the process,
serviceable or
inhabitable, viz.,
by delivering a
copy of the writ
to the defendant.

When we state each process *in particular*, we shall have to consider the precise mode of serving a writ of summons or *distringas*, or *capias*; but as essentially connected with the requisites of the writ itself, it is proper here to notice that the statute, 2 W. 4, c. 39, s. 1, 3, 4, 8 and 9, require a *copy* of each process to be delivered to the defendant, (or in case of a *distringas*, when the defendant cannot be *personally* served, to be *left for* the defendant,) with all notices, warnings, memoranda and indorsements, and the term *copy* is here construed strictly as to all the requisites enjoined by the 2 W. 4, c. 39, in the *writ* itself, though as to the indorsements of the claim of debt and costs, required only by the rule of Court of Michaelmas term, 3 W. 4, less strictness has been required, and we have

(q) *Coulson v. King*, 2 Crompt. & J. 474.

seen that an amendment in the latter instance is now in general permitted on payment of costs. (r)

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It will be observed that accuracy in the copy of the process, delivered to the defendant, as respects information to the defendant himself, is even more important than any authority to the sheriff, because it is the document by which principally his proceedings are to be regulated. (s) It has therefore justly been held that nothing can in strictness be deemed a copy, unless it be precisely similar, and that the slightest omission in a supposed copy of a matter required by the statute, and to be found in the writ itself, would be fatal; and even the omissions of the teste or date of the writ, (t) or (at least it was formerly so) the omission of the letter *l* in Middlesex, (u) or of the *s* in the sheriffs of London, (x) or indeed any other omission, (y) or the improper addition of the letter *s* to sheriff of Middlesex, (z) though it will be observed neither could affect the steps to be taken by the defendant, is fatal, nor will the Court permit an amendment. (a) But still we have seen that the omission, or addition, or mistake of a letter, not really altering the sound, sense or meaning, has in the most recent cases been considered immaterial. (b) If a proper copy of the process be not delivered to the defendant, the arrest or service of the writ is to be deemed incomplete, for the object of the statute was to give the defendant information of the precise demand made against him. (c)

Thirty-three, The other requisites to be observed, after the service or execution of the writ, might perhaps be more properly considered after we have stated the particular mode of executing each writ by service, arrest, &c.; (d) but as we have proposed in this chapter to take a general and comparative view of all mesne process and proceedings thereon, we will here give a summary. The 2 W. 4, c. 39, s. 1, enacts, that the person serving a writ of summons shall indorse on the writ the day of the month and week of the service thereof; and the

Thirty-three,
Indorsements of
time of serving
or executing
writ.

(r) *Ante*, 213.

(s) *Byfield v. Street*, 10 Bing. 28; and see *Street v. Carter*, 2 Dowl. 671.

(t) *Perring v. Turner*, 3 Dowl. 15; *Byfield v. Street*, 2 Dowl. 739.

(u) *Ante*, 186, 187; but see *id.*

(v) *Nichol v. Boyn*, 10 Bing. 339.

(y) *Ante*, 187; *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Smith v. Pennell*, 2 Dowl. 651; *Street v. Carter*, *id.* 671.

(z) *Barker v. Weedon*, 1 Crompt. M & R. 396; *Jackson v. Jackson*, *id.* 438, 3 Dowl. 182, S. C.

(a) *Byfield v. Street*, 10 Bing. 27; 2 Dowl. 739; but see 3 Nev. & Man. 564.

(b) *Forbes v. Mason*, 3 Dowl. 104 and see *Nichol v. Boyn*, 10 Bing. 340 and *ante*, 231, 232, as to misspelling.

(c) Per Tindal, C. J., in *Nichol v. Boyn*, 10 Bing. 339.

(d) *Post*.

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rule 3 of M. T. 3 W. 4, orders, that he shall make such indorsement *within three days* at least after such service, and that otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and that every *affidavit* upon which such an appearance shall be entered shall mention the day on which such indorsement was made. (f) The 4th section, 2 W. 4, c. 39, as to a *capias*, enacts, that the officer executing the same shall *forthwith*, after the execution of such process, cause *one copy* of the writ, with every memorandum or notice subscribed, and all indorsements thereon, to be delivered to every person upon whom such process shall be executed, whether by service or arrest, and shall indorse upon such writ the true day of the execution thereof, whether by service or arrest. And rule 4 of M. T. 3 W. 4, orders, that the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall *within six days* at the least after execution thereof, whether by service or arrest, indorse on such writ the true day of execution thereof, and in default thereof shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the Court or judge shall direct. Moreover, the form of *capias*, as prescribed in schedule 4, requires the sheriff, immediately after he has executed the writ, to return the same, together with the manner *and day of* execution.

Forms of indorsement of service or execution of mesne process.
Consequences of sheriff's non-compliance.

The form of indorsement on a writ of summons or on a *capias* may be as subscribed. (g)

If a sheriff should neglect to comply with this rule, by not indorsing on the writ of *capias* the day of its execution, the plaintiff's remedy is not by attachment, but by a motion to the Court for a rule calling on the sheriff to shew cause why he should not amend his return according to the fact, as to the time of the arrest stated in an affidavit in support of the motion,

Indorsement of time of service on a writ of summons.

(f) See form of such affidavit next chapter.

(g) The indorsement on a writ of summons may be thus:—

This writ was served by me, John Atkins, on the within named C. D. on Monday the 8th day of January, A.D. 1835.

John Atkins.

The like on a writ of *capias*,

The form of indorsement on a *capias*:—

"C. D. was arrested by me, G. H. by virtue of this writ on the — day of —, 1835, and forthwith after such arrest I on the same day delivered to the said C. D. a copy of this writ. G. H." [or if the defendant or one of them was served with the *capias*, then as to him indorse thus:—"This writ was served by me, G. H. on the within named C. D. on the — day of —, 1835. G. H."]

and also make compensation to the plaintiff as the Court shall direct for the delay and damage stated in the same affidavit, and also why he should not pay the costs of the application. (h)

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Thirty-four, As a general rule to be observed with reference to the execution of all process that may afterwards require an *affidavit*, specifying the mode of executing the same, it is advisable, especially as now there is no expense of stamp duty, to make such affidavit in the *first* instance, for from want of it, in case of the death or absence of the officer or party who served or executed the process, the Court would not receive or act upon mere hearsay evidence of the service. (i) The forms of such affidavits applicable to the service of each process will be found in the succeeding chapters.

Thirty-four,
Affidavits of
execution of
process.

Thirty-five, *Rules or orders to return writs*.—The 2 W. 4, c. 39, s. 10, enacts, that the *return to bailable* process shall be made by the *sheriff or other officer* to whom the writ was directed, or his successor in office; and *process not bailable* is to be returned by the *plaintiff or his attorney* suing out the same, as the case may be; but any return to process not bailable is not usual, excepting in proceedings to save the statute of limitations, when it may become necessary to return the first non-bailable process "*non est inventus*," and to enter the same of record within the time and in the manner enjoined by the same section.

Thirty-five,
Return to writ,
by whom to be
made.

It will be observed that the prescribed forms of the writs of *capias* and of *detainer* command the sheriff or other officer "*immediately*" after the execution of the writ of *capias* or service of the writ of *detainer* to return the writ to the proper Court, together with the manner in which he executed the same, and the day of the execution thereof; and rule 4 of M. T. 3 W. 4, we have seen, requires that the sheriff or other officer, having the return of a *capias*, shall within six days after he executed it, indorse the true day of the arrest. The 11th and 12th rules of H. T. 2 W. 4, ordered, that where the rule to return a writ expired in the vacation, the sheriff should file the writ at the expiration of the rule, or as soon after *as the office shall be open*, and that the officer with whom the return was filed should indorse the day and hour when filed. (j)

(h) *Ridley v. Weston*, 2 Moore & S. 724; Tidd, 97; *Moore v. Thomas*, 2 Dowl. 760, S.C.

(i) *Daniels v. Varity*, 3 Dowl. 26.

(j) See Jervis's Rules, 45, notes (l); and (m).

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It has been observed, that perhaps the *return* may be reckoned of the day of the officer's so marking the return, but not *always* so as regards the teste of a writ of exigent founded thereon, which might be of the day when the sheriff actually *left* his return in the proper office, (k) or of that made by the officer.

Enforcing return to, and proceedings upon writs in vacation by a rule of Court in term time, or judge's order in vacation, and subsequent attachment thereon.

The stat. 2 W. 4, c. 39, s. 15, enacts, that "it shall be lawful in term time for the Court out of which *any writ* issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* shall have issued, to make *rules*, and also for any judge of either of the said Courts, *in vacation*, to make *orders* for the return of any such writ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose; provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court." The rule M. T. 3 W. 4, ordered, that in case a judge shall have made an order in vacation for the return of *any writ* issued by authority of the aid act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon, but an *attachment* shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime. And by rule H. T. 3 W. 4, "in case a rule of Court or judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer shall return *cepi corpus* thereon, a judge's order may thereupon issue, requiring the returning officer (within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term,) to bring the defendant into Court, *by forthwith putting in and perfecting bail above to the action*; and if the returning officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such

(k) *Lewis v. Davison*, 3 Dowl. 275.

order, whether the bail shall or shall not have been put in and perfected in the meantime." (l)

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These rules requiring an *immediate return in vacation*, altered the previous practice, according to which the sheriff in such a case had until the whole of the first day of the ensuing term to file his return, which in mesne process occasioned unnecessary delay pending vacation; (m) and it has been recently decided that a sheriff is bound to pay the necessary extra fee of 5s. 10d. for opening the treasury during vacation, in order to file his return, if an order to make the return under this 15th section of the uniformity of process act has been made; and that the 3 & 4 W. 4, c. 67, s. 2, as to making writs of execution returnable immediately, applies also to *executions* issued on *judgments* obtained as well before as since it passed. (n)

In the King's Bench it appears to be the practice to require two distinct motions in these cases, one for making the judge's order for the sheriff's returning the writ a rule of Court, and another motion and rule for an attachment against the sheriff for not duly returning the writ in pursuance of such order; (o) but in the Court of Exchequer, adverting to the terms of the above rule, *one* motion and rule suffices. (o)

A sheriff may and ought *voluntarily*, and without any rule or order for the purpose, to return to the Court what he has done in obedience to the command of the writ; but if he neglect to do so within eight days after he has executed the writ, then the plaintiff, or his attorney, may as a matter of course enforce a return by a rule of Court in term time, or by a judge's order in vacation.

The *rule of Court* in term time to return a writ, is a side bar or treasury rule, which may be obtained in term time from the clerk of the rules in King's Bench, or from the filacer in Common Pleas and Exchequer; (p) and by rule 1 Hil. T. 2 W. 4, s. 96, it may be obtained on the last as well as any other day in term. The *rule* expires in four days after service in London or Middlesex, and in six days in any other city or county. (q) It has been suggested that the time thus allowed a sheriff, especially of a distant county, to return a writ, since the rule

Rule to return writ, when and how obtained.

(l) See the rule 3 Tyr. 241.

(m) 5 East, 386; Jervis's Rules, 45, note (i).

(n) *Rex v. Sheriff of Surrey*, 3 Dowl. 82.

(o) *Stainland v. Ogle*, 3 Dowl. 99;

Howell v. Bulteel, 2 Cr. & M. 339.

(p) Tidd, 9th edit. 484; see practice 1 Arch. K. B. 4th edit. 152; T. Chitty's Forms, 50 to 56; and *post*.

(q) Tidd, 9th edit. 307; Dax's Pr. 116; Chitty's Summary, 71.

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may be served at his London office, to be kept, under 3 & 4 W. 4, c. 42, s. 20, is now too short, and that in some cases it might be impracticable to return the writ within the prescribed time. (r) The proceedings on a rule or order on a sheriff to return a writ will be more properly fully considered when we examine the whole of the proceedings against a sheriff for non-performance of his duty, especially in bailable actions, where the defendant has escaped, or has not put in and perfected bail above. It is, however, expedient here to consider the different forms of returns to writs of *capias*.

Forms and re-
quisites of
Returns to
mesne process.

When the sheriff returns *cepi corpus* to a writ of *capias*, *i. e.* that he has arrested the defendant, the usual form indorsed on the parchment writ may be one of the following four, adopting that most applicable to the facts. If the defendant be *not found*, the sheriff is to return *non est inventus*, as below, where also will be found the forms of several other returns to mesne process. The returns to process issued in order to *outlaw* a defendant, or to save the statute of limitations, will be found in subsequent chapters. (s)

(r) 9 Legal Observer, 147, 148. And see the observations of Park, J. in *Grant v. Gibbs*, C. P. Hil. T. 1835, 1 Harrison's Rep. 58.

Return of *cepi corpus*, and bail-bond taken.

(s) On the — day of —, A.D. 1835, (a) I took the within-named C. D. in my bailiwick, and forthwith delivered to him a copy of this writ, and him safely kept until he † gave me bail in the within action, as by this writ is required, and as I am within commanded. (b)

The answer of

Samuel Wilson, }
James Hauner, } Sheriffs.

Return to a *capias* of *cepi corpus*, and a deposit of debt, and £10, pursuant to 13 G. 3, c. 46.

[The same as above to the †, and then as follows :] until he deposited in my hands, by delivering the same to my officer appointed for that purpose, the sum of £—, being the sum indorsed on the said writ by virtue of the affidavit for holding to bail in this action, together with £10 in addition to such sum to answer costs, pursuant to the statute, and which said sums I have paid into the hands of, &c.

In King's Bench, "of the signer of writs of and in the Court of King's Bench;" in Common Pleas, "of the prothonotaries of the Court of Common Pleas;" and in the Exchequer, "of the clerk of the pleas of the Court of Exchequer." (c)

Return to a *capias* of *cepi corpus et paratum habeo*, &c. where a defendant remains in sheriff's custody.

On the — day of —, A.D. 1835, I took the within-named C. D., and forthwith delivered to him a copy of this writ, * and whose body I have ready as within I am commanded. (d)

The answer of L. M., Sheriff.

(a) The rule Mich. T. 3 W. 4, Rule 4, requires the *true day* of the execution to be indorsed by the sheriff, &c.

(b) *Seemle*, the words in italic, though usual, may be omitted.

(c) The form of return sometimes states a deduction by the sheriff for his fees, but according to *Stewart v. Bracebridge*, 2

Bar. & Ald. 770; 1 Clitty's Rep. 529; *Hunn v. Brinc*, 6 Moore, 124; *Haines v. Nairn*, 2 Dowl. 43; neither the sheriff's nor any other officer's poundage or fee can be deducted on an order for payment of this money out of Court, 1 Arch. K. B. 4th edit. 147.

(d) *Supra*, note.

If the sheriff return non est inventus to a capias, the Courts will not, even upon strong affidavits of an arrest and collusion between the defendant and officer, compel the sheriff to alter his return, but will leave the plaintiff to his remedy by action for the escape and false return, as a better mode of trying the fact than by affidavits. (t)

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Proceeding on a return of non est inventus to a capias.

Thirty-sixth, When process has been served or executed upon a defendant, there are various circumstances to be forth-

Thirty-sixth, Summary of the circumstan-

* [Same as last to the *, and then as follows:] whose body remains in the prison of the lord the king, under my custody.

The answer of L. M., Sheriff.

The like, and defendant in prison.

[Same as the third form to the *, and then as follows:] whose body I have ready as within I am commanded, but the within-named E. F. is not found in my bailiwick.

The answer of L. M., Sheriff.

Return of arrest of one defendant, and non est inventus as to another.

[Same as the third form to the *, and then as follows:] who remains in my custody as such sheriff under the said writ, but is so weak and infirm, that without great peril and danger of his life I cannot take his body to any prison, but whose body I have ready.

The answer of L. M., Sheriff.

Return of cepi corpus and languidus. (a)

[Same as the first form, *ante*, 248, note, to the †, and then proceed thus:] safely kept until and upon the — day of —, A.D. —, when and on which day I received an order under the hand of William Bolland, knight, one of the Barons of the Court of Exchequer, which is in the words and figures, or to the purport and effect following, that is to say, [here set out the judge's order for discharge of defendant verbatim, and at the end the officer's certificate that defendant had entered an appearance, being one of the terms of the order, and was indorsed on order thus:] Indorsed, I certify that an appearance hath been entered for the defendant herein. Dated the 5th day of November, A.D. 1834. Wm. Perry, (L.S.) In obedience to which said order I discharged the said C. D. out of my custody, and permitted him to go at large. Therefore I cannot have his body before the Barons of His Majesty's Exchequer at Westminster, as I am within commanded.

The answer of

Alexander Raphael, } Sheriff.
John Illidge, }

Cepi corpus and detention until defendant was discharged by a judge's order.

The within-named C. D. is not found in my bailiwick. Dated this — day of — A.D. 1835. (b)

The answer of L. M., Sheriff.

Return to a capias of non est inventus.

(a) This form differs from that in T. Chitty's Forms, 53, but is adapted to a case where an officer has arrested a defendant, and cannot safely remove him to any prison, and retains him in custody even in the defendant's own house, and as he certainly lawfully may.

(b) Some forms omit the date of the return, but it seems preferable to insert it, as the writ of exigent and proclamations are to be dated on the day the sheriff's return took place, *Lewis v. Davison*, 3 Dowl. 275.

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ces to be attended to by a Defendant promptly after service or execution of process in general.

with attended to by him. Some of these are of a *general* nature, extending more or less to *all* process, and others confined or limited to one of the five forms of writs we have thus generally examined; those of the former nature, according to the intention of this chapter, may be *here* properly noticed; those of the latter description will be more properly stated when we consider each process and proceedings thereon in particular. There is, however, one general advice, viz. that every defendant, *immediately* he has intimation of process, should examine and take advice upon every circumstance in his favour, and *promptly* act, because he may otherwise lose the benefit. Thus he has only four days ~~during~~ which he *must* pay the indorsed debt and costs, or incur further expense; and in general he must object to every irregularity *within eight days* after he has been served with a copy of the writ of summons or *capias*, or he will be too late, if he have any intimation of the proceeding; and he must also enter his appearance or put in bail above in eight days, or certain inconveniences and expenses may ensue.

The principal circumstances to be attended to by a defendant upon whom process has been executed, are, first, the right to inspect the original parchment writ and warrant, and immediately to receive an *exact copy* of the former. He has in the next place, if arrested, a right to insist on being taken to any friend's house in the county within three miles of the place of arrest, for the first *twenty-four* hours, and before he can be legally taken to any prison, lock-up house, tavern, &c. He may also immediately deposit the sum indorsed on the writ as sworn to, with £10 in lieu of a bail-bond; or he may, with two friends having sufficient property in the county, so as to be probably known to the officer, tender and execute a bail-bond; or sometimes he may prevail on his attorney to give his undertaking to the plaintiff's attorney to put in and perfect bail above; or he may be exchanged into the custody of a more friendly officer, or one who has a more convenient lock-up house in the county; or, if privileged from arrest, may apply to a judge for his discharge; and which, if arrested whilst attending a superior Court, may be obtained *instanter*. Within four days he may pay the debt and costs indorsed, as the extent of the plaintiff's claim, without incurring any further costs. He may also require the supposed plaintiff's attorney to state whether the writ was issued with his authority, and if he answer in the affirmative, to state in writing the profession, occupation, and residence of the plaintiff. He may also now in all the Courts, in some actions, obtain particulars of the plaintiff's *demand*

before appearance or bail above, and without affidavit. He must also, within the eight days allowed for entering his appearance or putting in bail, cause a motion to the Court to be made, or a summons, obtained in general on a proper affidavit of facts, to set aside the proceeding for irregularity.

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POINTS.

Thirty-seventh, There is one proceeding on the part of a defendant applicable to *all* writs, which it will be proper to notice in this chapter, on the *general* requisites of process, and proceedings thereon, viz. the right of a defendant; under the 2 W. 4, c. 39, s. 17, (u) to require the attorney whose name is indorsed on mesne process as having issued the same as attorney for the plaintiff, to *declare* whether the writ was issued with his authority, and if he answer in the affirmative, then the Court or a judge may order such attorney to declare in writing the profession, occupation, or quality and place of abode of the plaintiff, and if he neglect to do so he may be attached; and if the attorney declare that the writ was not issued by his authority, then the Court or judge may order the defendant's immediate discharge from imprisonment; (u) and the rule of Court, Mich. T. 3 W. 4, r. 14, ordered, that if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further order. (x) The form of such request, and of the attorney's compliance, may be to the effect subscribed in the note. (y) The forms of affidavit

Thirty-seventh,
A defendant's proceedings to ascertain as well the authority of the plaintiff's attorney to proceed, as also the description and residence of the plaintiff.

(u) See the enactment, *ante*, 153, in note, and also *ante*, 210, 211.

(x) See the rule, *ante*, 161, note.

(y) In the —.

Sir,

I do hereby, in pursuance of the statute in that case made and provided, demand and require you to declare to me forthwith in writing, whether a writ of summons, dated on, &c. and indorsed as having been issued against me C. D., of, &c. by you E. F., of —, as the attorney for A. B., has been issued by you, or with your authority or privity; and if you shall answer in the affirmative, then I hereby require you to declare in writing, within — days from the service hereof, the profession, occupation, or quality and place of abode of such plaintiff. Dated this — day of —, A.D. 1835.

Yours, &c.

C. D., the above-named defendant,

or,

L. M. of, &c. attorney for the said C. D.

To Mr. E. F., of, &c.

In the Court of —.

Between { A. B., Plaintiff,
and
C. D., Defendant.

In pursuance of your request, I hereby declare that the writ of summons with which you have been served at the suit of A. B., was issued by me and with my authority,

Demand in writing under stat. 2 W. 4, c. 39, s. 17, by a defendant on plaintiff's attorney requiring him to declare whether the process was issued by him or with his authority, and also to state the place of abode, &c. of the plaintiff.*

Attorney for plaintiff's compliance with request. †

* See another form, T. Chitty's Forms, 43, where see a form of a judge's order for plaintiff's attorney to state the pro-

fession, &c. of plaintiff.

† See form of statement in obedience to a judge's order, T. Chitty's Forms, 44.

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to obtain the defendant's discharge, on the ground that the writ was issued without the attorney's authority, and of the order of a judge and rule of Court, and writ of supersedeas therein, will also be found in print. (z) This enactment and rule now enable a defendant not only to ascertain whether the plaintiff's attorney has adequate authority to receive a debt and costs, or compensation, but also enable the defendant to find out the claimant, and make terms with him personally if he think fit.

and that the said A. B. resides and carries on the business of a —, at the house and premises situate and being No. —, in — Street, in the parish of —, in the county of —, and that the same house was and is the place of the abode of the said A. B. Dated, &c.

Yours, &c.

E. F., of, &c. plaintiff's attorney.

(z) T. Chitty's Forms, 44 to 46.

CHAPTER VI.

OF THE WRIT OF SUMMONS, PROCEEDINGS THEREON, AND
APPEARANCE.

Consideration, what process to issue.
Plaintiff's right to abandon service-
able process and issue *capias*

SECT. I. *Form and requisites of writ
of summons, and indorse-
ments and service thereof.*

First, The enactments and rules
relating to

1. The 2 W. 4, c. 39, s. 1,
and 3 & 4 W. 4, c.
67, s. 1

2. The Rules Mich. T. 3
W. 4

Second, Form of writ with in-
dorsements

Third, When this writ preferable.

Fourth, Of several concurrent
writs of summons

Fifth, Practical proceedings on
issuing same

Sixth, Service of, how to be
made

1. Of what copy

2. By whom to be served .

3. On whom

4. Time of service

5. Place of service

6. Mode of service by de-
livering a copy

Seventh, Indorsements of day of
service

Eighth, Return of summons, non
est inventus

Ninth, Proceedings in case of
defendant's default of appear-
ance

Tenth, Of disputed service
SECT. II. *Proceedings of the defendant
after service of summons .*

1. Demanding inspection of
the principal writ and
taking copy thereof . .

2. Search for and examina-
tion of *præcipe*

3. Demand whether writ
issued by authority of
attorney, &c.

4. Discovery of irregulari-
ties and time and mode
of objecting to same .

5. Payment of indorsed
debt and costs

6. Summons to stay pro-
ceedings on payment
of debt and costs, and
taxing costs thereon . .

7. Time when to appear . .

8. Mode and form of ap-
pearance by defendant
or by plaintiff for him.

1. By defendant

2. By plaintiff for de-
fendant

9. Of declaring on a sum-
mons

AN attorney having been retained and fully instructed, and hav-
ing considered all the circumstances of the particular case, as
recommended in the preceding chapter, (a) the next question is,
what process should be issued? and as the *first* process is the
root of the action from which all subsequent proceedings
spring, (b) and it *now* in general governs the subsequent pro-
ceedings and *may materially* influence the successful result of
the action, (b) this part of practice (especially as mistakes

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Consideration
what process
should be issued.

(a) *Ante*, 114 to 139.

(b) An eminent special pleader, partial
to fanciful illustrations, has resembled an
action, and the proceedings therein, to a
tree, considering the writ or process as the
root, the declaration the stem or body, the
pleas the main branches, the replications

and subsequent pleadings, issues, verdict
and judgment as the *smaller ramifications*,
and the execution for debt, damages and
costs as the fruit. As, however, any
utility in following this supposed analogy
is not very obvious we will not pursue it.

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therein now may occasion such an infinity of troublesome, dilatory, and expensive summonses, or motions to set aside the proceedings for irregularity,) demands particular attention. Although the ancient process has been entirely abolished as regards *personal* actions, and five newly framed writs have been substituted by the uniformity of process act, 2 W. 4, c. 39, yet the principal object of all the different processes, whether ancient or modern, has always been, and must continue to be, that of *compelling the appearance of a defendant to answer a plaintiff's complaint*, and in *bailable* process also to secure the ultimate satisfaction of the claim or the render of the defendant to prison; so also the principal question is, and will continue to be, *how are those objects to be best attained?* This must depend in a great measure on the varying circumstances of each case. If there be a debt of twenty pounds or upwards which can be sworn to, and it is expected that before judgment can be obtained the defendant will probably dispose of his tangible property and abscond, then a *bailable writ of capias* or a writ of detainer to *arrest* or *detain* the defendant, and have him imprisoned or continue his imprisonment, and compel the security of bail, may be proper; but if there be no such debt, or if there be no reason to suspect that the defendant will abscond, then a *writ of summons* should be preferred. (c) If the defendant evade process, but has *goods which may be distrained*, then a writ of *distringas* to seize such goods, but always to be preceded by a writ of summons, will be proper; but if the defendant has already *absconded*, or *will avoid process*, or is *abroad*, then proceedings to *outlawry* should be preferred.

A plaintiff's right to abandon serviceable process and issue bailable without first discontinuing.

It was held, before the uniformity of process act, 2 W. 4, c. 39, that a plaintiff who has issued and even actually served on the defendant serviceable process *may abandon the same* by giving him notice of such abandonment, and requiring *him in writing not to appear*, and may afterwards, without first discontinuing, issue bailable process for the same debt, and arrest the defendant; (d) and since the uniformity of process act the same practice has been decided to be regular. (e)

We will now proceed to examine each of the several modern process with more particularity; in doing which, to avoid repe-

(c) See the question whether or not it be expedient to arrest considered, *ante*, 137 to 139, and *post*, chap. viii. of a writ of *capias*.

(d) *Bishop v. Powell*, 6 Term R. 616.

(e) *Chapman v. Vandewalde*, Hil. T. 1835, K. B. 3 Dowl. 313; 9 Legal Obs. 300.

tition, it will constantly be necessary to keep in *recollection* or to *refer* to the last preceding chapter, where we purposely took a view of *all* the *principal requisites* and *incidents* more or less affecting *every description* of mesne process as the best mode of examining the subject.

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SECT. I.—THE REQUISITES OF A WRIT OF SUMMONS, AND THE
PROCEEDINGS THEREON.

First, The 2 W. 4, c. 39, s. 1, enacts, “ that the process in
“ all such (i. e. personal) actions commenced in either of the
“ said Courts, in cases *where it is not intended to hold the de-*
“ *fendant to special bail* or to proceed against a member of par-
“ *liament*, according to 6 Geo. 4, c. 16, (viz. as a trader and
“ subject to the bankrupt law, and provided for in section 6,
“ and schedule No. 6,) *shall* (whether the action be brought by
“ or against any person entitled to the *privilege* of peerage or
“ of parliament, or of the Court wherein such action shall be
“ brought, or of any other Court, or to any other privilege, or
“ by or against any other person,) be *according to the form* con-
“ tained in the schedule to this act annexed, marked No. 1. (and
“ before stated), (f) and such process may issue from either of
“ the said Courts and shall be *called a writ of summons*, and in
“ every such writ and copy thereof, the *place and county of the*
“ *residence or supposed residence* of the party defendant, or
“ wherein the defendant shall be, or shall be *supposed to be*,
“ shall be mentioned, and such writ shall be *issued* by the officer
“ of the said Courts respectively, by whom process serviceable
“ in the county therein mentioned hath been heretofore issued
“ from such Court, (g) and every such writ may be *served* in the
“ *manner heretofore used* in the county therein mentioned or
“ *within two hundred yards* of the border thereof, and not else-
“ where, and the person serving the same shall and is hereby
“ required to indorse on the writ the day of the month and
“ week of the service thereof.”

First, The enact-
ments and rules
relating to a writ
of summons.

Enactment of
2 W. 4, c. 39.

The schedule No. 1, then prescribes the *form of the writ of*

Schedule and
prescribed form

(f) *Ante*, 150 and 154, in note.

(g) See alterations as to such officer in K. B. by 3 & 4 W. 4, c. 67, s. 1, which enacts, that all writs of summons, distringas, capias, and detainer issued into *Middlesex* from the Court of K. B. shall be *signed, sealed, and issued*, and the fees

thereon shall be taken and accounted for by the same person or persons, and in like manner as all other writs of summons, distringas, capias, or detainer issued from the said Court of K. B. under and by virtue of the said recited act.

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of writ of sum-
mons.

Rule Mich. 3
W. 4, 2nd Nov.
1832.

The duration of
a writ of sum-
mons.

summons, and of the *memorandum* at the foot, and *some* of the *varying indorsements* thereon. (*h*)

The general rule Mich. T. 3 W. 4, (referring to that of Hil. T. 2 W. 4,) in actions for a *debt* requires an *indorsement* of the *sum claimed and costs*, and a notice in the form prescribed by the antecedent rule of Hil. T. 2 W. 4, that on payment of the same within four days further proceedings will be stayed. (*i*)

The 10th section prescribes the *duration* of the writ of summons to be four calendar months inclusive of the day of issuing, but authorizes *the continuance* of such process by alias and pluries writs of summons. The 12th section requires the writ to be *dated*, on the day it is issued, and to be *tested* in the name of the chief justice or chief baron of the Court out of which it is issued, and to be *indorsed* with the name and place of abode of the *attorney* actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, *then also* with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; and in case *no attorney* shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by *the plaintiff in person*, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. (*k*)

Secondly, The
Form and Re-
quisites of a
Writ of Sum-
mons, Memo-
randum and In-
dorsements.

Secondly, We have seen that the 2 W. 4, c. 39, s. 1, and other sections, contain some enactments as to the *form* and *requisites* of the writ of summons itself; and the schedule No. 1 gives the *form* of such writ against a single defendant, with certain initials and blanks, in lieu of which certain facts, applicable to and varying in each particular case, are to be inserted. (*l*) It will be observed that, *1st*, In lieu of the initials C. D., the actual full Christian and Surname of the defendant is to be stated: (*m*) *2dly*, The particular place as well as county of the defendant's residence, or supposed residence, is to be stated in the body of the writ, (*n*) and if there be several defendants, each must be separately described by his full Christian and Surname, and place and county of residence: *3dly*, The Court in which the appearance is to be entered, but without stating any particular office, so that the defendant, unless

(*h*) See the forms in blank, *ante*, 154, in note, and *post*, as to the several blanks or points which are to be filled up according to the facts of each case.

(*i*) See form of rule, *ante*, 160, in note, and see the decisions on that rule and consequences of nonobservance, *ante*, 212 to

215.

(*k*) See the several requisites, *ante*, 202 to 212.

(*l*) *Ante*, 154, and see notes.

(*m*) *Ante*, 165 to 174.

(*n*) *Ante*, 174 to 181.

he employ an attorney, must himself ascertain such office: (o) 4thly, The form of action must, we have seen, be described succinctly with great care and precision, and yet by no means conveying any certain knowledge of the particulars of the subject-matter or ground of action: (p) 5thly, The Christian and Surname of the plaintiff or plaintiffs must be described fully and accurately: (q) 6thly, In lieu of the initials A. B., printed in the schedule in that part of the writ of summons, which intimates to the defendant that in default of his causing an appearance to be entered in due time, an appearance will be entered for him, the full Christian and Surname of the plaintiff or plaintiffs must be repeated, and not the mere reference to the prior statement, by using the words "the said plaintiff:" (r) 7thly, The name of the chief justice or chief baron of the proper Court for the time being must be inserted in the next blank, as "Witness, Thomas Lord Denman, Chief Justice," or "Sir Nicholas Conyngham Tindal," or "James Lord Abinger, at Westminster," or in case of a temporary vacancy in either office, then in the name of the senior puisne judge of the particular Court: (s) and 8thly, The true day when the writ is actually issued must be inserted in the last blank. (t)

As respects the memorandum at the foot of the writ, stating its duration, the form is invariably in the words prescribed in the schedule. (u)

With respect to the indorsements on a writ of summons, there appears to be only one that must be invariably indorsed on a writ of summons, i. e. that of the name and abode of the plaintiff's attorney, (x) or agent and attorney; (y) or of his own residence when he sues in person. (z) When the action is strictly for a debt or money demand, then there must also be an indorsement of the amount of the claim for such debt and costs. (a) The forms of such indorsements are usually as stated in the notes. (b)

(o) Ante, 193.

(p) Ante, 194.

(q) Ante, 198.

(r) Ante, 200, n. (p).

(s) Ante, 202.

(t) Ante, 202.

(u) Ante, 205.

(x) Ante, 208.

(y) Ante, 209.

(z) Ante, 211.

(a) Ante, 212.

(b) 1. This writ was issued by John Tompkins, of No. 7, King's Bench Walk, Temple, London, attorney for the said John Atkins.

2. This writ was issued by John Tompkins, of No. 7, King's Bench Walk, Temple, London, Attorney, as agent for James Adams of Chelmsford, in the county of Essex, attorney for the said John Atkins.

Indorsements.

1. Of the name &c. of principal attorney issuing a writ.

2. The like, where the attorney issues writ as agent for another attorney.

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&c.

We have seen, however, that after a copy of the writ of summons has been served upon a defendant, and within three days at least, there must be an indorsement made on the writ of the time of such service, (c) and which must afterwards be sworn to, or the plaintiff cannot enter an appearance for the defendant under the statute 12 G. 1, c. 29. The form of such indorsement is as in the note. (d)

Thirdly, When a writ of summons is or is not proper.

Thirdly, The writ of *summons* is the proper and only process against all persons whatsoever, when the defendant is not to be arrested, and when he is not a member of parliament and trader intended to be proceeded against according to the Bankrupt Act, 6 G. 4, c. 16, s. 9 and 10; and it may be adopted, whether or not the defendant be privileged as a peer or member of parliament, or officer of the Court, or an attorney, or a corporation, or hundredors; and even in cases where the defendant is a prisoner in actual custody in some other

3. Indorsement when plaintiff sues in person.

3. "This writ was issued in person by John Ade, who resides at No. 208 in the Strand, in the Parish of St. Clement's Danes, in the county of Middlesex."

4. Indorsement on copy of writ of debt and costs prescribed by rule 5, Mich. T. 3 W. 4, and Hil. T. 2 W. 4.

4. "The plaintiff claims 50*l.* 10*s.* 6*d.* for debt, and 1*l.* 17*s.* 6*d.* for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

See the usual form of indorsement, as prescribed by the two rules Hilary term, 2 W. 4, and Michaelmas term, 3 W. 4, referring to the same, *ante*, 160, in note. With respect to the claim for costs, it is only stated in the aggregate, without shewing the items. See the work intitled *Bills of Costs*, page 4. Such aggregate is in general thus composed.

The costs where a writ is served in London or Middlesex may be thus.

	£	s.	d.
Letter for payment of debt (when sent)	0	3	6
Instructions to sue	0	6	8
Writ of summons	0	12	0
Copy and service	0	5	0
Bill of costs	0	2	0
Attending settling, when debt above 20 <i>l.</i> , (if under 20 <i>l.</i> then only 3 <i>s.</i> 4 <i>d.</i>).	0	6	8
Letters	0	2	0
	1	17	10

If the service be near to but out of London, and no attorney reside near to the defendant, then a further charge of 1*s.* a mile, according to the distance from London, may be made, in respect of the journey to make the service.

When process is served in the country by an agent for a town attorney, properly concerned, or when the country attorney, properly concerned, employs an agent in London, the bill of costs is increased by 3*s.* 6*d.* for a letter to the agent, and his charge for copy and service, and postages, and 3*s.* 6*d.* for letter in reply. See *Bills of Costs*, p. 4 and 5.

(c) Gen. Rule, Mich. T. 3 W. 4, r. 3, *ante*, 160 and 242.

5. Indorsement on writ of time of service.

(d) 5. This writ was served by me, *William Cartwright*, on the within named defendants, Henry Butler, Thomas Poole, and James Adams, on Saturday, the eleventh day of May, 1835. *William Cartwright*. And see form, *ante*, 244, note (g).

action, he *may* be *personally served* with a copy of this process whilst in prison, when it is *not* intended to detain him in the action in which process is issued. When there are *several* parties to be sued jointly, and one is to be arrested and the other only served with process, then a copy of a *capias* jointly against all the defendants may be personally served on the latter; but it has been held that in an action against one *defendant alone* a service of the copy of a writ of *capias* would not be regular. (c) A writ of summons may be issued, and afterwards a *distringas* and proceedings to outlawry may be founded thereon; consequently this process is by far more frequent and extensive in practice than either of the other forms, and on that account, as well as because it stands first in the uniformity of process act, 2 W. 4, c. 39, s. 1, and schedule No. 1, we will here give it particular consideration. The form of the writ against a single defendant, as printed in blank in the schedule No. 1 of the 2 W. 4, c. 39, has been already stated in a note, (d) and which may be readily altered and applied against *several defendants*.

Fourthly, If it be doubtful in which of several counties the defendant is to be found, the plaintiff may at the same time issue and have in force *several different original writs of summons* into each county, by describing the defendant in one writ as residing or being in some place in one county, and in another writ or writs describing him as resident in another place and county. But it has been supposed that the defendant could not be charged with more than the expense of that writ, with which he has been first actually served. (e)

Fourthly, Of several concurrent writs of summons.

Fifthly, Having received the *full instructions* from the client, as before recommended, (f) (and which should state at all events the Christian and Surname of the plaintiff and of the defendant, and the residence of the latter, into the county of which residence the writ is to be issued, and the cause of action so fully as to enable the attorney or agent in London to decide upon the best *form of action*,) the regular course, and which in the Court of Exchequer is indispensable, (g) is for the plaintiff's attorney to make out a *præcipe*, or short instructions for and abstract of the writ of summons, and which *præcipe*,

Fifthly, Practical proceedings in issuing a writ of summons.

(c) MS. Nov. 1833, K. B.; 1 Arch. K. B. 4th ed. 512,
(d) *Ante*, 154, in note.

(e) *Dunn v. Harding*, 10 Bing. 553.
(f) *Ante*, 117 to 124.
(g) *Ante*, 220, 221.

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being the substance of the writ, forms its basis, and is to be left and filed (*h*) with the officer, who afterwards signs the process. It is also a prudent precaution to enter a copy of such præcipe, as well as of the writ and indorsements, in a book kept in the office of the plaintiff's attorney, so as to avoid the consequence of loss in the office or elsewhere; and such præcipe may be in the form in the note. (*i*)

A writ of summons, printed in blank on parchment, with at least two copies printed in blank on paper, and a copy for each defendant, when there are several, are then to be purchased of a stationer, and when issued from the Court of Exchequer may be purchased *already sealed*. (*k*) These, with all the indorsements, excepting that relating to the time of serving the writ, are then to be filled up and carefully examined with each other, so as to avoid a variance. These, when the writ is from the King's Bench, are to be taken to the signer of the writs, (*l*) and when from the Common Pleas, to the filazer for the proper county, (*m*) and when from the Exchequer, to a master of that Court, (*n*) and to each 2s. 6d. is to be paid for *signing*, and at the same time the before mentioned præcipe is to be left with and filed by the signing officer. (*o*) The writ is then, when issued from the King's Bench or Common Pleas, to be taken to the Seal Office and *sealed* on payment of 7d.; but in the Exchequer we have seen that the writ of summons may be purchased *already sealed*. (*p*)

Sixth, Service to be personally of an exact copy of the writ, as before the 2 W. 4, c. 39.
1. Of what copy.

Sixth, The statute 2 W. 4, c. 39, s. 31, requires service "as heretofore," and which refers to 12 G. 1, c. 29, which required *personal* service of a *copy* of the writ. (*q*) Hence strictly the service should be of an exact *copy*, and not with the

(*h*) But the omission of the *filing* will not affect the validity of the proceedings, ante, 220, 221.

Form of Precipe for a writ of summons.

(*i*) *Middlesex. Summons for John Atkins and John Ford against Thomas Poole of Tabernacle Row, Stepney, Middlesex, and James Hood of the same place and county.*

Promises.

Tested 1 February, 1835.

Indorsed E. F. of No. 7, King's Bench Walk, Temple, London, attorney for plaintiff.
Indorsed claim £ — debt, £ — costs. *

(*k*) *Ante*, 224.

(*l*) *Ante*, 223.

(*m*) *Ante*, 223.

(*n*) *Ante*, 223.

(*o*) *Ante*, 220.

(*p*) *Ante*, 224, 225.

(*q*) See a valuable note in Tidd's Supp. A. D. 1833, p. 73, note (*e*), as to the mode of serving process before 2 W. 4, c. 39, and to which that act, by the words "as heretofore," manifestly refers.

original writ of summons, (r) which is to be retained in order to indorse thereon the time of service, as directed by 2 W. 4, c. 39, s. 1, and rule Mich. T. 3 W. 4, r. 3 & 4. The copy should, in strictness, exactly correspond to a letter with the original, or at least there must be no difference that could alter the *sound or sense*; (s) but a trifling omission of a word or letter, not altering the sound, sense, or meaning, will not, according to the more recent decisions, prejudice. (s) And it is not necessary in the copy to insert the name of the officer who wrote his name as *signer* of the writ, or to imitate the *seal*. (t) Under the former act, 12 G. 1, c. 29, and when the process by quo minus was in force, the Court of Exchequer held that the defendant was entitled to a *complete* copy of the *whole* process; and the same principle still prevails. (u)

The *manner* of service referred to was by 12 G. 1, c. 29, by making a *precise copy* of the entire contents of the writ; and now of the memorandum and indorsements required by the 2 W. 4, c. 39, or its schedule. (x) Before that act it was held in the Exchequer that a variance in the body of the copy of the process from the writ itself, was a fatal irregularity; (y) and we have seen, that since the 2 W. 4, c. 39, a very *small* variance or omission, either in the copy of the body of the writ, (z) or of the indorsement, (a) especially when prescribed by that *statute*, is fatal, though a defect in an indorsement merely prescribed by *rule of Court* is amendable on payment of costs. (b) But according to some recent decisions, principally on bailable process, if the omission or misstatement in the served copy do not alter the *sound, sense, or meaning* of the process, then the Court will not interfere to set aside the service for irregularity. (c) We have seen that the Court have refused to amend the copy of a writ even in cases where they perhaps might have permitted an amendment in the writ itself; (d) but the precise ground or principle on which such distinction proceeds has been questioned. (e)

(r) *Smith v. Anderson*, Prac. Reg. 342; *Peter v. Reignier*, id.; Barnes, 410, S.C.; 1 Sell. Prac. 88; Imp. C. P. 163; post, "Mode of Service."

(s) *Ante*, 229, 231; and see *Sutton v. Burgess*, 1 Gale, Exch. Rep. Hil. T. 17, overruling *Hodgkinson v. Hodgkinson*, as to omission of *l* in Middlesex.

(t) *Clutterbuck v. Wildman*, 2 Tyr. 276, ante, 224.

(u) *Wright v. Hooper*, 2 Tyr. 283.

(x) *Id. ibid.*; Pr. Reg. 354; Barnes, 405, S. C.; Tidd, 167, 168.

(y) 1 Price, 245; Tidd, 168. But

see *Huggett v. Parken*, 7 Moore, 359; 1 Bing. 65, S. C.

(z) *Ante*, 236.

(a) *Ante*, 229, 231.

(b) *Ante*, 234 to 236.

(c) *Freeman v. Mason*, C. P. Mich. T. 1834, 9 Legal Observer, p. 109; ante, 233; and see *Sutton v. Burgess*, *supra*, note (s).

(d) See per Tindal, C. J.; and see *Sutherland v. Tubbs*, 1 Chit. R. 320, note (a); Tidd, 168.

(e) See per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565, ante, 236.

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In practice, each of the writs prescribed by 2 W. 4, c. 39, is to be completed on *parchment*, and the copy, or copies in cases of several defendants, intended to be served, is printed on *paper*, with blanks, and may be purchased of any law stationer, and they are afterwards filled up by the plaintiff's attorney, or by himself, if he proceed in person.

2. By whom to
be served.

It is not necessary that serviceable process should be executed by an officer of the sheriff, for it may be served by any person, even by the plaintiff himself or his attorney, though it is usually served by a clerk of the latter, or by some intelligent person. (f) As it will be observed that in the usual *affidavit of service* the deponent not only states the fact of *personal service* of a copy of the writ, and of the memorandum subscribed and indorsements made thereon, upon the defendant, but also *swears* that the writ of summons itself *appeared to the deponent to have been regularly issued*, it is obvious that not only should the party who is to serve such copy be able to read, (f) but should actually read and compare with minute attention the copy with the writ, after the same and all requisite indorsements have been filled up, and also *understand the legal requisites* of the proceeding, so as to be able afterwards with propriety to swear to the necessary affidavit; (g) as an imperfect service would put the defendant on his guard, so as probably afterwards more carefully to avoid a regular service, it is of importance to employ an intelligent person in the first instance. If the person who served the copy be aware of any irregularity or deviation from the proper requisites of the writ, or memorandum or indorsements, or the copy served, he could not with propriety swear to the service in the usual form; and in such case it might be advisable to annex to the affidavit a

(f) *Delafield v. Jones*, Prac. Reg. 345; *Cooke's cases*, Prac. C. P. 34; 1 Sel. Pr. 89; Imp. C. P. 163; Tidd, 168.

(g) In *Delafield v. Jones*, Cooke's Rep. 34; Imp. K. B. 163, the Court declared that the service of process by a bailiff who could neither write nor read, was not good; for the statute 12 G. 1, c. 29, intended that process should not be served by illiterate persons, because it directs that affidavit should be made of the service of a copy of the process, but service by a person who can read writing suffices. It was strongly recommended by that experienced and excellent judge, Mr. Justice Bayley, that practitioners should not suffer youths inexperienced in law to swear

so frequently as is the practice to so many affidavits, the import of which they do not well understand. It certainly behoves all respectable practitioners systematically to enjoin in their offices the solemn obligation of an oath, lest by habit a laxity and want of due care in swearing should be encouraged, or at least tolerably permitted. That conscientious judge in particular reprobated the then frequent practice of mere boys being permitted to swear to affidavits in opposition to bail, attacking their character and stating an hearsay narrative, in an affidavit obviously settled, if not prepared by some older practitioner, so as to fit the occasion, whatever it might be.

complete copy of the copy served on the defendant, and swear to the service thereof, and that such document is a copy of the original, but omitting the statement of his belief of the *regularity* of the proceeding. (h)

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The statute 12 G. 1, c. 29, s. 1, in terms requires "*personal service on the defendant*," to enable a plaintiff afterwards to enter an appearance according to that statute, and the 2 W. 4, c. 39, s. 1, refers to that practice. The 13th section of that act enacts, "That every such writ of summons issued against a corporation aggregate, may be served *on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary* of such corporation, and every such writ issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred, or other like district, on some *peace officer* thereof."

3. On whom to be served.

It will be observed, that although the service of a declaration in ejectment *on the wife* of the tenant in possession is admitted to be sufficient to enable the plaintiff to proceed to judgment and execution in default of an appearance, yet it is otherwise in *personal* actions; and therefore it was recently decided that if one of several defendants be abroad, the Court will not order that service of process *on his wife* shall be good, or restrain the other defendants from pleading his nonjoinder in abatement; (i) but now if a joint contractor be out of the jurisdiction, the plaintiff need not join him in the writ, as the other defendant could not plead the nonjoinder in abatement, without alleging in his plea, and swearing in his affidavit verifying such plea, that the defendant is resident in England and where. (j) It is clear that although in mercantile concerns, and in order to determine a tenancy a notice to quit, and some other notices, when served upon one of several joint-tenants or partners is deemed equivalent to notice to all, yet *in legal process* each defendant must *be actually* served or arrested before the plaintiff can proceed in an action against him. (k).

In an action against *husband and wife*, it suffices to serve the *husband* alone with a copy of the writ, who must thereupon

(h) Post, 289, 290, and form 291, note (g).

(i) *Davis v. Morgan*, 2 Tyr. R. 288; 2 Crompt. & J. 237, S. C.

(j) 3 & 4 W. 4, c. 42, s. 8.

(k) *Larwell v. Middleton*, 1 Chit. Rep. 319; *Worley v. Bull*, Pr. Reg. 351; Tidd's Supp. 1833, p. 74.

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appear for himself and wife. (k) But in an action against *two or more* defendants, *each* must be served with an exact copy of the process and indorsements. (l)

Consequences
of service on a
wrong person.

As the very object of the *service of process* is to inform the intended defendant of the necessity for his appearing and pleading to the action, it seems scarcely necessary to observe that a service on a *wrong party* is inoperative, for the party serving the same cannot safely make the affidavit of *personal service* on the defendant named in the writ as required by the statute, before the plaintiff can enter an appearance for the defendant; so as to proceed to judgment. But if there have been a mistaken service upon a wrong party, the right person may *afterwards* be served with a copy of the same writ, or with an alias summons, or in bailable process an alias *capias* may be executed. (m)

We have before suggested, that when there are two or more persons of the same name, or nearly so, it is very material in or by the writ, or by some distinct instructions, to give some particular description, so as to identify the proper party, and to be particularly careful that the service be on him; for if a wrong person should be served and appear and defend the action to trial, *without collusion* with the intended party, or his interference in the conduct of the suit, the plaintiff would be non-suited. (n) And if the mistake should be discovered before the trial, unless the collusion or interference of the proper party can be clearly proved, (o) the safest course would be to abandon that action and begin *de novo*.

4. Time of service.

The 2 W. 4, c. 39, s. 10, limits the duration of all the writs thereby prescribed to four calendar months from the day of the date, including the same; and of course it must be served before the expiration of that time. It may be served at any hour, however late at night, and after ten o'clock, for the rule of Court does not extend to *process*; (p) and before the uniformity of process act, 2 W. 4, c. 39, it was held good service even at eleven o'clock on the night of the return day. (q)

(k) *Baucombe v. Love and wife*, Barnes, 406, 412; Pr. Reg. 351, S. C.; Tidd's Supp. 1833, p. 74.

(l) *Israel v. Middleton*, 1 Ch. Rep. 319; *Wortley v. Bull*, Pr. Reg. 351; Tidd's Supp. 1833, p. 74.

(m) — v. *Johnson*, 2 Bar. & Cres. 95; 3 Dowl. & Ry. 254, S. C.

(n) *Wilde v. Keep*, 6 Cur. & P. 235.

And see ante, 168, note (i).

(o) As in the instance, ante, 168, note (i).

(p) *Anonymous*, 2 Chitty's Rep. 357; 1 Dowl. & Ry. 172; *Priddee v. Cooper*, 7 Moore, 358; 1 Bing. 66, S. C. See rule, ante, 110.

(q) *Woburn v. Neale*, 2 Burr. 813; 2 Wils. 372.

But *service on Sunday, Christmas day, or Good Friday* would be absolutely void, as well at law as in equity : (r) though all other holidays are abolished, as they affect process. (s) It may, however, be served on any day between the 10th August and 24th October, although no *declaration or pleading* can be filed or delivered between those days. (t)

We have however just seen, that an insufficient service, as upon a wrong person or on an improper day, does not determine the legal efficacy of the writ, and, therefore, a copy might *afterwards* be served upon the right party, or at a proper time. (u) It was long ago decided, that even serviceable process cannot be served on a party to a cause whilst he is attending the trial thereof at the sittings, (x) and à fortiori it would be so as to a witness ; (x) for if persons so attending a Court of justice were liable to be *served with process*, they might be deterred from attending at the risk of being served with process, and thereby enabling a plaintiff to prosecute his action against him with effect. (x) As the writ cannot legally be issued before the cause of action has accrued, it follows that it cannot be previously served. (y)

The *place* of the service or execution of mesne process, as regards writs of summons, is regulated by the statute 2 W. 4, c. 39, s. 1, which enacts, that the writ of summons may be served *in the manner heretofore used (z) in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere.* And we have seen, that under the 20th section serviceable orailable process issued into a county surrounding some other county, may be executed in either. (a)

5. *Place of service of summons or execution of capias.*

The 1st section requires the service of the copy of the summons to be in the *county therein mentioned*, or within two hundred yards of the border thereof, and not elsewhere. It is probable that such distance would be calculated in a straight line, and without regard to the more circuitous walking distance ; (b) and with reference to prior decisions, if there should be any dispute as to the boundaries of the county, or probably the exact distance of yards from its borders, the Courts would

(r) *Ante*, 105, 106. In equity, *Muckreth v. Nicholson*, 19 Ves. 367, but on terms of entering appearance.

(s) *Ante*, 105, 106.

(t) 2 W. 4, c. 39, s. 11.

(u) *Clarke v. Johnson*, 2 B. & C. 95 ; 3 D. & R. 254, S.C.

(x) *Cole v. Hawkins*, 2 Stra. 1094,

more fully reported in *Andrews*, 275 ; 1 Sellon, 90 ; *Tidd*, 168.

(y) *Ante*, 159.

(z) As to the *previous practice*, *Tidd*, 166 to 170 ; 241 to 243.

(a) *Ante*, 241, 242.

(b) *Leigh v. Hind*, 9 B. & C. 774 ; 4 Man. & Ryl. 597.

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not determine it on motion.(c) The safer course in practice is to direct the writ, or describe the county in which the defendant is supposed to be, as the larger county surrounding another smaller district, which is a county of itself; in which case the 20th section of 2 W. 4, c. 39, renders the service in either of the two counties regular and sufficient.(d) If the defendant be served out of the proper county, he must shew by his affidavit in support of a motion to set aside such service that the place was not on the confines of the county, and must also shew what precise distance from the same the service actually took place, and an affidavit *swearing* that he was served "*some distance*" from the proper county will not suffice.(e)

6. Mode of service of writ to be as heretofore, i. e. by personal service of a copy of the writ of summons.

By the express terms of the enactment in 2 W. 4, c. 39, s. 1, "*writs of summons are to be served in the manner heretofore used*,"(f) necessarily referring to the *antecedent* practice relating to serviceable process, which was in general governed by the 12 G. 1, c. 29, s. 1, and the decisions thereon.(g) The statute enacts, that when the plaintiff has not made an affidavit of debt, and does not proceed to arrest the defendant, "he shall *serve* the defendant or defendants *personally* within the jurisdiction of the Court with a *copy of the process*,"(h) and not with the writ itself.(i) The term *served* as here used imports "*personal delivery of a copy of the writ to the defendant*,"(k) and then enacts, that if the defendant do not appear to such process, it shall be lawful for the plaintiff, upon affidavit being made *and filed* in the proper Court of the *personal service* of such process as *aforsaid*, to enter a common appearance, or file common bail, for the defendant; and proceed thereon as if the defendant himself had appeared. Since this enactment *personal service* is indispensable, and must be *positively sworn* to in substance according to the form presently given,(l) excepting in one instance, in proceedings against

(c) See several cases, Tidd, 163.

(d) Dowl. Statute, 2 W. 4, c. 39, in notes, p. 144.

(e) *Coulson v. King*, 2 Cromp. & Jer. 474; *Storer v. Rayson*, 3 B. & C. 158. *Semble* overruling the dictum of Wood, B. in *Monday v. Lear*, 11 Price, 122.

(f) 2 W. 4, c. 39, s. 1; see previous practice, Tidd, 166 to 170; 241 to 243; Tidd's Supp. 1833, p. 73, n. (e), a valuable note.

(g) As to the decisions and prior practice, see Tidd's Supp. 1833, p. 73, n. (c).

(h) i. e. a copy of the *principal process* out of the superior Court. In one of the

latest cases it was determined in King's Bench, that where a non-bailable latitat issued into Lancashire, and a *mandate* thereon was obtained from the Chancellor to the sheriff, service of either the *latitat* or the *mandate* sufficed, *Ashbrook v. Townley*, 2 Barn. & Ald. 416; and Tidd's Supp. 1833, p. 73, n. (e); but see *Impey's C. P.* 164.

(i) *Worley v. Glover*, 2 Stra. 877; 1 Sellon, 89.

(k) *Smith v. Anderson*, Pr. Reg. 343; *Peter v. Reigner*, id.; Barnes, 410, S. C.; *Imp. C. P.* 163; 1 Sellon, 88.

(l) See form, *post*, 289.

persons who entered the king's service, in which case the 7 & 8 G. 4, c. 4, s. 130, permitted the leaving of process against such persons at the last place of residence of the defendant.

It is advisable to deliver an *exact copy* of the writ, and all the indorsements filled up, excepting that of the day of service to the defendant, without any intimation of its import until after he has read or accepted it. If he should then demand an inspection of the original. (but not otherwise,) (*m*) it must be produced and shewn, or the refusal would render the service irregular. (*n*) And where after a arrest the copy of a *capias* was delivered to the defendant, and in a quarter of an hour afterwards, and whilst the defendant remained in the same custody, the defendant demanded to see the original, which was refused by the officer, the service of the *capias* and the subsequent proceedings were set aside on that account. (*o*) If the defendant should upon tender of a copy of the process and explanation to him of its contents, refuse to receive it, it was held that it might be immediately left at his house, (*p*) or if he lock himself in, it may, after a simultaneous explanation of its contents, be put through the crevice of the door. (*q*) And in one case in Common Pleas it was considered that if the defendant keep out of the way to avoid being served, the writ may be sent to him in a letter *by the post*, and that such service sufficed if it were sworn that he opened the letter and took out the copy. (*r*) But that doctrine was overruled in a subsequent case, which establishes, that as the statute expressly requires *personal service*, the sending a copy of a writ in a letter by post will not suffice if the defendant refuse to receive it, however wilfully and vexatiously; (*s*) and even where a person was about to serve the defendant with a copy of process by a wrong name, and the defendant thereupon stated his correct name, and the person serving offered to alter the writ, but the defendant said "never mind, I am the person, and *will take care* of it," and took the copy, even that service was decided to be irregular, though the Court refused to give costs. (*t*) And the merely leaving a copy of the process with the defendant's shopman, (*u*) or at his house or place of busi-

(*m*) *Panchard v. Woolley*, Barnes, 302.

(*n*) *Thomas v. Pearce*, 2 B. & C. 761; 4 D. & R. 317, S. C.

(*o*) *Westley v. Jones*, 5 Moore, 162.

(*p*) *Wood v. Dodgson*, Barnes, 278; Imp. C. P. 164.

(*q*) *Smith v. Wintle*, Barnes, 505; Prac. Reg. 354; Tidd, 169; Imp. C. P.

164.

(*r*) *Boswell v. Roberts*, Barnes, 422; *Atwood v. Hicks*, 5 Taunt. 186; 1 Marsh. 8, S. C.; *Rhodes v. Jones*, 7 Bing. 329.

(*s*) *Redpath v. Williams*, 3 Bing. 443.

(*t*) *Israel v. Middleton*, 1 Chit. Rep. 319.

(*u*) *Thompson v. Phenev*, 1 Dowl. 441.

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ness, (x) is not sufficient. And where one of two defendants in an action on a contract was abroad, the Court refused to order that personal service on his wife, who was in England, should be deemed good service, or that the other defendant should be restrained from pleading in abatement. (y) In a recent case (z) Mr. Justice Taunton decided in the Practice Court of King's Bench that the service must be *personal*, but which might be either by leaving the process with the defendant, or *bringing it clearly to his presence and knowledge*; and Mr. Justice Patteson decided to the same effect in a subsequent case in the same Court; (a) and it has been justly observed, that as plaintiffs, under the third section 2 W. 4, c. 39, have now a method of proceeding to judgment and execution against defendants *without personal service*, viz. by distringas, the Court will no doubt hold the former (i. e. *personal service*) to great strictness in the affidavit of personal service; and Mr. Justice Patteson condemned the practice, which, it was stated, had crept in, of plaintiff's seeking to file common bail according to the statute 12 G. 1, c. 29, bringing in *any affidavit of any kind or sort*, which stated that the defendant had been served personally, and then set forth the particular mode of service, *which was not personal service at all*. He observed, "I do not mean to say that it is necessary to leave the process in the *actual corporeal possession* of the defendant, for whether the party touches him, or puts it into his hand, is immaterial for the purpose of personal service; and personal service may be where you see a person, and *bring the process to his notice*. *If the deponent had informed the defendant of the nature of the process, and thrown it down, that would have done*;" (a) and it seems that a person intending to serve the defendant may, if necessary, lay hands upon him for the purpose of so doing, taking care to do no more than is essential to inform him of the purport and intent of the process. (b)

At the same time, it seems that, if on behalf of the plaintiff, a *sufficient affidavit of personal service* has in fact been made and filed, the Court will not on a suggestion of perjury interfere to set aside an appearance *sec. stat.* unless it be *very clearly*

(x) *Digby v. Thompson*, 1 Dowl. 363; *infra*, n. (z).

(y) *Davis v. Morgan*, 2 Tyr. 288. But the 3 & 4 W. 4, c. 42, now provides a remedy.

(z) *Digby v. Thompson*, E. T. 1832;

Dowl. Stat. notes on 2 W. 4, c. 39, p. 141; and 1 Dowl. 363.

(a) *Thompson v. Phenev*, Dowl. Stat. 142, 143, a long note.

(b) *Harrison v. Hodgson*, 10 B. & C. 445.

and positively sworn that the defendant had not even intimation of the process. (c)

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It is usual and proper to deliver the copy of the writ open into the hand of the defendant himself, and it is not advisable to inclose the copy in a sealed envelope, which, perhaps, the defendant may refuse to open and will return, unless a personal interview can be obtained, in which case, if the defendant should decline opening the letter, the person offering the same may himself open it and shew the writ to the defendant, or state its contents if he refuse to read it. (d) If the defendant attempt to go away leaving the copy unread, it would seem that the party employed to serve the writ might, after declaring his object to serve process upon him, and verbally stating at whose suit and in what Court or form of action, stop and detain him by gentle means, as by laying hold of his coat until the copy of the writ had been read and explained to him, and afterwards placed in his hands. (e) The parchment writ itself should be ready to be shewn to the defendant, but it is not necessary to produce it, (f) unless the defendant require it at or soon after the time of service, (g) when it seems necessary to shew it. (h) If the defendant refuse to receive the copy of writ when actually tendered or produced to him, it may be immediately afterwards left for him at his house, and personal service may be properly sworn to; (i) so if it can be sworn that the defendant received a letter, and took out the copy of the writ this might suffice. (k) And where a writ was put through the crevice in the door of a room in which the defendant had locked himself, that was deemed sufficient service. (l) But merely leaving a copy of a writ with the defendant's shopman, or at his place of business or residence, will not suffice, (m) and sending process by the post in a letter which the defendant

(c) *Morris v. Coles*, 2 Dowl. 79, post.

(d) It would be amusing to enumerate the instances in which variations in the modes of service have on discussion been held sufficient. Goldsmith, it will be remembered, narrates an instance, in which a writ was executed against him under colour of a supposed invitation from a noble lord to examine a poem he was about to publish, with a proffer of fifty guineas for his criticism, sent on embellished paper, and by his coachman and footman with his carriage, but which were in fact hired pro hac vice by a sheriff's officer.

(e) *Harrison v. Hodgson*, 10 Bar. & Ctes. 445.

(f) *Worley v. Glover*, 2 Stra. 877;

Panchard v. Wooley, Barnes, 302; *Boswell v. Roberts*, id. 422.

(g) *Thomas v. Pearce*, 2 Bar. & Ctes. 761; *Edgar v. Palmer*, R. T. Hardw. 138; *Westley v. Jones*, 5 Moore, 126; *Petit v. Ambrose*, 6 M. & Sel. 274.

(h) *Edgar v. Farmer*, Cas. T. Hardw. 138; 1 Sell. 89.

(i) *Bell v. Vincent*, 7 Dowl. & R. 233; *Pigeon v. Bruce*, 8 Taunt. 410; *Wood v. Dodgson*, Barnes, 278.

(k) *Boswell v. Roberts*, Barnes, 422; *Aldred v. Hicks*, 5 Taunt. 186.

(l) *Smith v. Wintle*, Barnes, 405.

(m) *Thompson v. Pheney*, 1 Dowl. 441; *Digby v. Thompson*, 1 Dowl. 363; but see observations on that case in *Phillips v. Ensell*, 4 Tyr. 815.

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refuses to receive is not good service, although the refusal may have been wilful and accompanied by long avoidance of process; (n) and yet, if from the knowledge of the handwriting or otherwise, it could be shewn that the defendant knew that the letter contained the writ, it seems to have been supposed that then such service might suffice. (o) In short, there appear to be many instances in which, if the party, who has served the copy of the writ, has *ventured to swear positively to the personal service of a copy of a proper writ in the common form* without disclosing the precise mode of service, the Court will not afterwards interfere to set aside the appearance or proceedings thereon, unless the defendant, by his affidavit, induce the Court to believe that he had *no knowledge* or even intimation of the process or contents in due time: thus where a father eluded the service of process, and the copy was served at his house on his son, who said his father was within, and that he should receive the process, and it did not otherwise appear but that it had come to the defendant's hands, the service was deemed sufficient; (p) and where upon conflicting affidavits it appears doubtful whether or not the defendant has been duly served or served at all, the Court will not interfere, but will discharge a rule for setting aside the proceedings, (q) and in another case the Court of Exchequer held, that not only *service*, but also *knowledge* of the copy of process, as well as of the process itself must be denied, in order to induce the Court to set aside proceedings for irregularity and want of service of process. (r)

(n) *Ridpath v. Williams*, 3 Bing. 443; 11 Moore, 333, S. C.

(o) *Aldred v. Hicks*, 5 Taunt. 186; 1 Marsh. 8, S. C.

(p) *Rhodes v. Innes*, 7 Bing. 329; 5 Moore & P. 153, S. C., observed upon in *Phillips v. Ensell*, 4 Tyr. 815.

(q) *Morris v. Colcs*, 2 Dowl. P. C. 79.

(r) *Cohen v. Watson*, 3 Tyrw. Rep. 238. As it is frequently of essential importance to the interest of a plaintiff to proceed with the utmost despatch in a cause, it is a great object to effect a *personal service* as soon as practicable, and to do this so effectually as not to endanger the result of a motion to set aside the service for irregularity. The party endeavouring to serve the process should, in the first instance, adopt all possible exertion to obtain an interview with the defendant, and for this purpose should immediately after he receives the writ and copy complete, call at the residence of the defendant with

the writ and copy ready to serve, and inquire for the defendant, and if stated to be within, should request to see him, and the delivery of any deceptive message as to the object of the call may be permitted. If it should be stated that the defendant is absent, he should then make an appointment to call again in the afternoon, at dinner hour, or some other appointed time, and if he suspect that the defendant is at that time at home, he should get some other person to call with the writ a short time after he has left, as probably the defendant may then be off his guard, in consequence of the afternoon appointment. But which, supposing the third person's attempt should be unsuccessful, should be punctually kept. If the latter should be unsuccessful, *another person*, after ascertaining the usual hours of the defendant's being at home, should make an appointment accordingly as on some totally different business for the next

Seventh, We have seen that the 2 W. 4, c. 39, s. 1, enacts that the person serving a writ of *summons* shall indorse on the writ the day of the month and week of the service thereof; (s) and the schedule No. 1, prescribes the *form* of indorsement, which with variations is subscribed. (t)

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Seventh, Indorsement on writ of day of service of copy.

The rule Mich. T. 3 W. 4, also orders, "that the person serving a writ of summons shall, *within three days* at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made," and it will be remembered that the 10th rule Mich. T. 3 W. 4, 1832, orders, that the *omission* of any insertion or indorsement shall be an irregularity. The object of this enactment was doubtless to compel the party serving the writ to indorse the time of service whilst the fact was fresh in his recollection, and if the indorsement on the writ should be omitted, such defect would be deemed an irregularity.

Eighth, Excepting in proceedings to prevent the operation of the statute of limitations, it is not usual to make any *formal return* to a writ of summons, but then it may be essential, and in other cases proper, at the expiration of the four calendar months, during which the writ is in force, for the plaintiff or

Eighth, Indorsement on writ of summons of "non est inventus."

day, and call at the time appointed. If, again unsuccessful at this third time, it may then be advisable to leave a copy of the writ with the servant, with a note to the defendant, stating that he will call again the next morning, at the same time to shew him the original, and that unless he will then afford an interview, he will publish a reward to any person for serving him personally with process, and circulate a placard amongst all persons in the neighbourhood. The late Lord Tenterden, in an action against the sheriff for not taking a defendant, when, as alleged in the declaration, he had an oppor-

tunity, stated that such measures were justifiable and proper in *all proceedings*, and shewed proper diligence; and see also *ante* vol. i. 453, 4, as to notices to ascertain an event. But in order to proceed afterwards by *distringas*, there must be three repeated calls, at each stating to the servant or person opening the door, *the real object of the call*,* and at the last a copy of the writ must be *left*,† and there must be an affidavit that the defendant keeps out of the way, shewing the circumstances.‡

(s) And according to Price Gen. Prac. 73, "the year."

(t) "This writ was served by me, X. Y. on Henry Butler, the defendant within named, (or on all the defendants within named, except L. M.) on Monday, the seventh day of January, 1835.

Form of indorsement of service of process. §

„ And I served this writ on the said L. M. on — the — day of February, A. D. 1835.

X. Y.
X. Y."

* *Johnson v. Disney*, 2 Dowl. 400; 617; 1 Arch. K. B. P. 4th ed. 530.

Willes v. Bowman, *id.* 413.

† *Hill v. Maule*, 1 Crom. & Meeson,

‡ And *post* *distringas*.

§ *Ante*, 243, 244.

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his attorney, under the authority of the 10 sect. 2 W. 4, c. 39, in case he has not been able to serve the defendant personally, to *return* the writ by indorsing the result as in the subscribed form. (x)

Ninth, The proceedings in case of defendant's default in appearance within eight days inclusive.

Ninth, It will be remembered that the sixteenth section of 2 W. 4, c. 39 enacts, "that *all such proceedings* as are *mentioned* in any writ, notice, or warning, issued under that act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

Tenth, Of disputed service.

Tenth, As the statute 12 Geo. 1, c. 29, requires a positive affidavit on the part of the plaintiff of *personal service*, (i. e. in general of the delivery of a copy of the writ into the hands of the defendant, or at least of the party serving the writ having distinctly brought the terms thereof to his knowledge, by tendering to him in person a copy of the writ and verbally communicating to him the substance of its contents,) (y) and as no deviation from the *substance* of the prescribed oath is permitted, and the deponent would be indictable for perjury if he should wilfully swear falsely, it might be supposed that scarcely a case could arise when any discussion on the sufficiency of the service could be raised; but it is sometimes otherwise, in consequence of either hasty swearing or mistakes in serving a wrong party. If the *usual positive affidavit of service* has been filed, (z) then the Court will not on motion interfere to set aside the service sworn to, when on reading the defendant's contradictory affidavits it appears *doubtful* whether the defendant was actually served personally, (a) and in order to induce the Courts to set aside the supposed service the defendant's affidavit must deny as well the service as his *knowledge* of the copy of the process; (b) and where the defendant moved to set aside a declaration on an affidavit that he had not been personally served with process, and the affidavits stated that the writ was twice

Return of "*non est inventus*" to a writ of summons.

(x) The within named C. D. is not found in the county of —, or within two hundred yards of the border thereof.

E. F. plaintiff's attorney,
or,

A. B. the above named plaintiff in person.
(If the writ were so issued).

(y) *Ante*, 269, 270.

(z) See form, *post*, 289, 290.

(a) *Morris v. Coles*, Tidd, 75; Legal Observer, 315; *sed quare*, for *semble*, the 12 G. 1, c. 29, seems to have implied on the plaintiff the proof of the *affirmative*.

(b) *Cohen v. Watson*, 3 Tyr. 238; but, *semble*, it would be otherwise if the defendant admitted his first receipt of the writ at a time too late to appear and denied previous knowledge.

served on the defendant's brother who resided with the defendant, and that the brother sent it back by the post to the plaintiff's attorney with a letter stating the fact, and also that the brother had no conversation with the defendant, the Court nevertheless refused to interfere, as it was not sworn on the part of the defendant that the copy did not reach the defendant's hands or come to his possession, or was not shown to him by his brother. (b)

Of an attorney's undertaking to appear on behalf of the defendant and enforcing the same. (c)

The 31st general rule of Hil. T. 2 W. 4, 1832, orders that "any attorney who *undertakes to appear* shall enter an appearance accordingly," and if he afterwards refuse to perform his undertaking, the Court will grant an attachment against him or strike him off the roll, (d) and this it is said notwithstanding he was imposed upon by the sheriff's officer at the time when he gave the undertaking. (e) According to some authorities the undertaking must be express and *in writing*, and *signed* by the attorney, or the Court will not enforce it by attachment. (f) However, no precise form of words is essential, and even if an attorney subscribe process or accept a warrant or declaration, with intent to induce the plaintiff or his attorney to suppose he will appear, the Court will compel him to do so. (g) The first of the subscribed forms of undertaking is usually indorsed on the writ; (h) but that secondly suggested may be preferable for a defendant, as it would clearly enable him to take advantage of any irregularity notwithstanding the undertaking. It is a usual courtesy, at least when it is not intended to arrest an intended defendant, for the plaintiff's attorney to request the party to name his attorney, who will undertake for him to enter an

(b) *Phillips v. Ensell*, 4 Tyr. 814.

(c) *Ante*, 240.

(d) R. Mich. T. 1654, s. 10; *Mould v. Roberts*, 4 Dowl. & R. 719; *Anon.* 6 Mod. 42; *Lorimer v. Hollister*, 2 Stra. 693; *Kilbey v. Weybergh*, 12 Mod. 251; as to serviceable process, 1 Sellon, 93; *Tidd*, 9 ed. 241; and see *Rogers v. Nevill*, 1 Term R. 422; and *Sedgworth v. Spicer*, 4 East, 569, as to *bailable* process, *ante*, 240.

(e) *Lorimer v. Hollister*, 2 Strange, 693; 1 Sel. Pr. 93, *sed quare*.

(f) *Lorimer v. Hollister*, 2 Stra. 693; *Lofft*, 192; *Stratton v. Burgis*, 1 Stra. 114; *Power v. Jones*, *id.* 445; in *Sellon*, 94, a quare is added whether the Court on motion would not enforce a *parel* undertaking.

(g) R. M. A. D. 1654, s. 10, 1 Lil. Pr. reg. 102.

(h) "We undertake to appear for the within named defendant (or defendants, or for E. F. one of the within named defendants) in due time."

J. and W.
22d Feb. 1835."

Or if to be qualified, then thus:—

"I undertake that an appearance shall be entered for the within named defendant in eight days from this date inclusive, without prejudice nevertheless to the defendant's right to avail himself of any irregularity or imperfection in the writ or endorsement, or copy or service. Dated this — day of —, A. D. 1835.

E. F.
Attorney for defendant."

Form of an attorney's undertaking to appear indorsed on writ of summons.

The like with a reservation of all objections, &c.

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appearance, and to obtain such undertaking so as to prevent any personal annoyance; but when it is probable that the defendant will not authorize an attorney to appear for him and will avoid process, it would be incautious to give him any such intimation; and if the defendant's attorney be in a dangerous state of health the safest course is to serve the defendant personally, because if the attorney should die before actual appearance, a difficulty or delay might ensue. A *general* unqualified undertaking to appear, would waive all irregularities in process and service, and therefore when it is not intended to waive the same, some qualification should be introduced in the undertaking, as, "i. e. without prejudice to the right of the defendant to take advantage of any irregularity in the process or copy or service thereof;" (*i*) but then probably the plaintiff's attorney would insist on personal service. The undertaking must also be performed substantially and in a proper manner, and therefore, if the defendant be an *infant*, the appearance must be by guardian, and if an action against husband and wife for both. (*k*)

SECT. II.—PROCEEDINGS BY A DEFENDANT ON SERVICE OF
SUMMONS.

1. Of demanding inspection of the principal writ of summons.

1st. When a defendant has been served with a supposed copy of process, he may and ought immediately, or within a reasonable time afterwards, to require the production of the parchment writ, so as to examine it with the alleged copy, in order to ascertain whether they sufficiently correspond, (*l*) though it should seem that before any proceeding on account of a supposed irregularity, the defendant's attorney might at any time require an inspection of the original writ, or he might search and examine the copy served with the original *præcipe* filed at the office of the *signer* of the writs; and this may be important before any summons or motion to set aside the process or the service, or both, as the summons or affidavit or rule nisi should be framed accordingly, and refer to the writ or even the *præcipe*, as well as the copy served, when any objection may be thereby fortified. (*m*)

(*i*) See second form in note (*h*), *ante*, 273.

(*k*) *Stratton v. Burgis*, 1 Stra. 114; *Power v. Jones*, *id.* 445; 1 Sellon Pr. 93; see *post*.

(*l*) *Wrestley v. Jones*, 5 Moore, 162,

ante, 250.

(*m*) It may be fortified or prejudiced by referring to the *præcipe*; in *Coppen v. Potter*, 10 Bing. 445, the *præcipe* removed the objections.

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2. We have seen that when an attorney's name has been indorsed on *any* writ serviceable or bailable, as having issued the same as attorney for the plaintiff, the defendant may on service, or arrest, require the attorney to state whether the process was issued with his authority; and if he answer in the affirmative, then he may by a judge's order be compelled to state the profession and residence of the plaintiff, and if he answer in the negative, the proceedings may be stayed; and in the case of an arrest, the bail bond cancelled, &c. (n)

2. Demanding of plaintiff's attorney whether he had authority to issue the writ, &c.

3. The 47th general rule Hil. T. 2 W. 4, 1832, now enables a defendant by leave of a judge "to obtain particulars of the plaintiff's demand *before appearance*, and without the production of any affidavit," (o) in order that immediately a defendant has been served with process he may in all cases ascertain and satisfy the claim before further expenses have been incurred; but as the proceedings to obtain particulars in general do not take place until after the plaintiff has declared, and the plaintiff must in some actions deliver such particulars with the declaration, we will postpone the full consideration of that subject to a subsequent page.

3. Of obtaining the particulars of plaintiff's demand.

4. If it be discovered that the writ itself is irregular, then in actions, when a tender is admissible, it is advisable, before informing the plaintiff or his attorney of the objection to the writ, to make a legal and sufficient tender of a sum sufficient to cover the debt; (p) but if the writ be sufficient and only the copy or service irregular, then the action having been sufficiently *commenced* a tender could not be pleaded, and the defendant should offer to pay the debt and the costs of the writ only, and if rejected should obtain a summons and order for staying the proceedings on such payment. (q)

4. Tender of the debt without costs.

5. If any irregularity in the writ or copy or service of the latter be discovered, then *forthwith*, and at least before the expiration of the four days allowed for paying the debt and costs, without incurring further costs, the defendant should decide whether he will take advantage of the error, and take out a summons or move the Court accordingly. The rule 33 of Hil. T. 1832,

5. Discovery of irregularities in writ or copy or service and time of taking advantage thereof. (r)

(n) *Ante*, 251, notes and forms.

(o) See previous practice, *Jervis's Rules*, 54, note (w).

(p) As to the requisites of a tender, see vol. i. 506, 507; *Finch v. Brook*, 1 Bing. New C. 257, 258.

(q) See the older cases as to the effect

of an offer of the debt and costs legally incurred, *Zeewin v. Cowell*, 2 Taunt. 203; *Roberts v. Lambert*, *id.* 283, S. P.; *Imp. K. B.* 166; and see *Elliston v. Robinson*, 2 Crom. & M. 343; 2 Dowl. 241, S. C.; *post*.

(r) See fully *ante*, 237.

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made before the 2 W. 4, c. 39, orders that "no application to "set aside process or proceedings for irregularity shall be "allowed unless made *within a reasonable time*, nor if the party "applying has taken a fresh step after the knowledge of the "irregularity." And this rule seems only an express declaration or recognition of what was the clear and undoubted ancient and established practice of the Court of King's Bench and Exchequer, but which differed in some respects in the Common Pleas, where sometimes effect was given to motions for irregularity at a later stage in a cause than the other Courts.^(s) It should seem that the application, whether by summons in vacation or term, or by motion to the Court in term, *must* be made *within eight days after the service of the writ inclusive of that day*, or, in other words, before the expiration of the time for the defendant's entering his appearance and before the defendant appears, which would waive all right to object, ^(t) because after that time has elapsed the plaintiff may have incurred expense in preparing the affidavit of service of the writ, and entering an appearance for the defendant, and filing his declaration. Indeed, in an action for a *debt* the application by summons or motion should properly be made within the four days allowed for payment of the indorsed claim, and with a stay of proceedings, if it can be obtained, until the application has been disposed of, so that if the result should be unfavourable the defendant may still offer, within the four days or perhaps an extended time, to pay the indorsed claim. If, however, a defendant can establish to the satisfaction of the Court or a judge, that he *never in fact had intimation of the process* until a subsequent proceeding on the part of the plaintiff, then it would suffice to object *promptly* after knowledge of the latter.^(u)

Reason for not
objecting to ir-
regularity in
mesne process.

But before any attempt to take advantage of any irregularity, it should be remembered that if taken, the plaintiff might immediately abandon the serviceable process, and commence a fresh action by *capias*, and arrest the defendant, and shew him no subsequent indulgence.^(v)

How to be taken
advantage of.

We have in the preceding chapter made some observations

(s) *Jervis's Rules*, 51, note (k); *Wetherall v. Hawes*, Barnes, 269; *Imp. C. P.* 164; *Fox v. Money*, 1 Bos. & Pul. 250. Before the above rule it was held in the *Common Pleas* that although a mistake in process was aided by the *defendant's* appearing, it was not so when the *plaintiff* entered an appearance for him, *Westall v. Finch*, Barnes, 406; and that irregularity in service of process might be complained of

at any time before interlocutory judgment, though not after, *Wetherhall v. Hawes*, *Prac. Reg.* 355; *Imp. C. P.* 164.

(t) Appearance in ecclesiastical Courts waives irregularities, *Prankard v. Deacre*, 1 Hagg. R. 183; *Hamerton v. Hamerton*, *id.* 23; *Wyllie v. Mott*, *id.* 33.

(u) *Seemle*.

(v) *Ante*, 254, note (d), (e).

on the time and manner of objecting to irregularities in process, or the copy or service. Before the 2 W. 4, c. 39, if a party, having been served with a supposed *copy* of process, but in which there was a variance or irregularity, it was considered to be necessary, in support of his rule to set aside the proceeding or any part thereof, *to produce the copy of the writ actually served*, and to swear to the service thereof, and also that he never had been served with any other; (x) and now, although such production in Court may not be absolutely requisite, yet if the copy be not produced, or positively sworn to have been destroyed, or to be in the possession of the plaintiff or his attorney, the application of the defendant may be prejudiced. (y) When the irregularity objected to is in the principal writ of summons itself, or in its indorsements, and not merely in the copy served, as in omitting the insertion of the day when issued, (z) then the motion should be *to set aside the writ* itself, and not merely the service thereof; and when the defect is merely in the *supposed copy* served, then the rule nisi should be to set aside the copy; (z) and if the writ and the copy be regular, and the objection be only to the *mode*, or *manner*, or *time*, or *place* of the *service* of the copy, then the summons or rule nisi should be only to set aside the *service*; (a) and a mistake either way in the terms of the rule nisi or summons might cause the same to be discharged, though probably without costs, if the proceedings were really defective. (a) But if a rule be sufficiently comprehensive, although too large, it may be made absolute in part. (a) In moving to set aside any proceedings for irregularity, care therefore must be observed so to frame the rule nisi as at all events to *include* that particular irregularity that will certainly be established. When a defendant has been served with a copy of a writ that appears to deviate from the prescribed form, then it should be ascertained before moving, whether the writ also is alike defective; for if it be, then, as the *copy* corresponds with the original, it is

(x) *Chanklin v. J'Anson*, Barnes, 298. 1 Ken. 374; 1 Sellon, 102; Imp. C. P. 164; 1 Tidd, 161, note (g), 169, (u); *Perrott v. Heale*, 3 Wils. 58; but see *Walker v. Hawkey*, 5 Taunt. 854.

(y) See observations of Tindal, C. J., in *Coppin v. Potter*, 10 Bing. 445.

(z) *Hasker v. Jarman*, 3 Tyr. 381; 1 Dowl. 654, S. C.

(a) *Id. ibid.* In this case the rule nisi was to set aside "The service of a writ of summons," on the ground that the same omitted the *teste*, but it appeared that

the defect was only in the *copy* served; and Bayley, B., said, "You might have moved to set aside the writ and service, and if it had then been objected to such rule that you had asked too much, if the writ was right the Court would then have set aside what appeared to be irregular; but here you have improperly moved to set aside the service, though your affidavit states no objection to the service, but to the writ itself, and therefore the rule must be discharged, though without costs."

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considered that the rule ought not to be framed merely to set aside the *service* of the copy, but also to set aside the *writ itself*; for there must be some irregularity in the *service* to warrant a motion to set aside the *service* only; and per Bayley, B., "If you move to set aside the writ and service, or the writ or service, and the *writ* turns out to be right, the rule would not be discharged, but will be made absolute as to so much as is irregular." (b) But in another case, where the rule nisi asked too much, the Court, in making only a part absolute, refused to allow costs, because if the rule had been confined to the objectionable proceeding, perhaps the opponent would not have incurred the expense of shewing cause, which he was obliged to do in order to prevent his opponent from obtaining too much. Upon the whole, therefore, the most prudent course is to draw up the rule to set aside only that part of the proceeding which is clearly objectionable.

The affidavit in support of motion to set aside proceedings, &c.

It has been observed that an affidavit to obtain and support a summons or rule nisi for setting aside the *service* of process in a *wrong county*, must not only state that the place of service is more than 200 yards distant from the county into which the process issued, but also that it is not surrounded by that county. (c) An affidavit to support a motion to set aside the supposed service of process, on the ground that there had not been *any service whatever*, must deny not only that the defendant was served with process, and that *no writ* or process came to his knowledge or possession, but also the like as to any *copy* of any writ or process, or the Court will not interfere; (d) and it was recently decided on a motion to set aside a declaration and all subsequent proceedings, on the ground that the defendant had not been served with process, that it was not sufficient for the defendant to swear that he had not been personally served with any copy of the process, and that the writ was served by mistake on his brother, who resided in the same house, and who returned the copy on the same day to the plaintiff's attorney; but that he must state further that the copy of the writ served *did not come to his possession*

(b) See previous note. *Sed quære*, ought it not to be considered that a defendant has a right to suppose that the original writ corresponds with the copy served, and ought he not therefore to be allowed in such case to move to set aside the writ as well as the copy, or at least having had reasonable ground for supposing that the

writ corresponds with the supposed copy, ought he ever to pay costs because it turns out that the writ did not correspond?

(c) Dowl. stat. 2 W. 4, c. 39, notes, page 144.

(d) *Coken v. Watson*, 3 Tyr. 238; *Phillips v. Ensell*, 1 Cr. M. & R. 374.

or knowledge. (c) The other requisites of an affidavit of this nature will be governed by the rules affecting affidavits in general, which will be considered in the chapter on motions. The forms in the note may assist. (f)

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When personal service has been sworn to on the part of the plaintiff, and when on a motion to set aside the proceedings on the ground that there was *in fact no personal service*, if on the conflicting affidavits on each side it appear doubtful whether there was such service, the Court will not interfere, but will discharge the defendant's rule for setting aside the proceedings with costs, because in making a motion of that nature the rule is, that the defendant must rely on the strength of his own affi-

Hearing rule and making same absolute, or discharging same, and on what terms.

(c) *Phillips v. Ensell*, 1 Cr. M. & R. 374; and see *Rhodes v. Innes*, 5 Moore & Payne, 153; 7 Bing. 329, S. C.

(f) In the Court of King's Bench (or "Common Pleas," or "Exchequer.")

Between { A. B. plaintiff,
and
C. D. defendant.

C. D. of ———, being the person against whom this deponent is *now* informed, and verily believes the above named A. B. hath issued a writ of summons, and hath entered an appearance in this action, and hath also filed his declaration thereupon, maketh oath and saith that *he hath never been personally served with any writ of summons or copy of a writ of summons, at the suit of the said A. B., either in the county of ———, or within two hundred yards distant from that county, or in any county surrounded by that county, or within two hundred yards distant from such county,* or elsewhere, nor hath he ever before the ——— day of ——— instant, when he was for the first time served with a notice that a declaration had been filed in this cause, had or received, or seen or been told, or heard of any writ or process, or copy of any writ or process, having been issued against him at the suit of the said A. B., nor had he before that day any knowledge, or notice, or intimation whatever, that any writ or process had been issued against him at the suit of the said A. B.]*

Affidavit on which to set aside the pretended service of a copy of summons.

First, denying the service of any writ or copy.

On the ——— day of ——— instant, he was served by a person, whom this deponent is informed and verily believes was and is a clerk to the plaintiff's attorney in this action, with the paper hereunto annexed, marked A., as and for a copy of a writ of summons, duly issued out of this Honourable Court, and which this deponent is informed and advised, and verily believes was at the time of such service and ever since hath been and still is defective and irregular in several respects, existing and apparent therein and therefrom before and at the time of such service, that is to say, &c. (state the objections, especially if they consist in a variance from the original writ): and this deponent further saith, that he hath not ever been served with any writ of summons, or any copy or supposed copy of a writ of summons, at the suit of the said A. B. other than and except the said paper, which this deponent is advised and believes, and submits to this Honourable Court, was and is defective and irregular as aforesaid.

The like, shewing the service of an insufficient copy of process.

After stating the exact place of service proceed thus, "and this deponent further saith that the said place, where he was so served as aforesaid, was not within two hundred yards of the border of the said county of ———, or upon the confines thereof, but upwards of ——— miles from the border of the said county, nor was the place where he was so served within or part or parcel of any county surrounded by the said county of ———, but was and is in the county of ———, and neither before nor at the time of the said service was there any doubt or dispute as to the boundary of the said county of ———, as respected the place where this defendant was so served.

Affidavit object- ing that the service was not in proper county, &c.

davits; (*g*) consequently, the affidavits in support of the application must be as explicit and positive as truth will admit.

The Courts, on making a rule absolute in part or whole, usually do so "*on terms*;" as where the objection in a bailable action is to the writ, they will discharge the defendant out of custody, and set aside the bail-bond; but on the terms that the defendant *shall enter a common appearance*, thereby enabling the plaintiff to proceed in the action although he has lost the security of bail; (*h*) and on motions in bailable actions it is usual for the defendant to offer such terms in his rule nisi, whereby, if accepted, he would avoid the risk of a second arrest. It seems, however, that where there is an *omission* in a writ of some matter that ought to have been inserted, according to 2 W. 4, c. 39, and constituting an omission declared by rule 10 of Mich. T. 1832, to be an *irregularity*, the defendant has an *unqualified* right to have the writ and service set aside; and it does not appear that there is any principle upon which the Court can so qualify that right by requiring the defendant to enter a common appearance; indeed if they had, then in serviceable process, however irregular, the plaintiff, by obtaining such appearance, would gain his principal object, and the use of the application to set aside proceedings would be entirely defeated, unless perhaps by the defendant's attorney obtaining costs, obviously of no benefit to the defendant himself. Supposing, however, that qualification of the rule should be objected to by the defendant, then the Court would probably refuse costs in cases when they have a discretionary jurisdiction over the same. (*i*) When the proceeding has been against *good faith*, we have seen that the Court, as of course, award costs against the party guilty of the breach. (*k*) It seems also questionable whether the Courts will assume the jurisdiction of imposing the terms that the defendant shall not bring any action for what has been done under the irregular writ, except as an alternative of giving or refusing the costs of the application.

6. Payment of
the indorsed
debt and costs.

6. If the defendant, upon service of the writ for a debt, cannot discover any irregularity, or if he resolve to waive it and pay the debt indorsed with the costs, he must do so *within four days* after he has been served, *exclusive of that day*, (*l*) though

(*g*) *Morris v. Coles*, 2 Dowl. 79; 6 Legal Observer, 315; Tidd's Supp. 1833, 75.

(*h*) As in *Rice v. Huxley*, 2 Dowl. 232; and *Nicol v. Boyn*, 10 Bing. 339.

(*i*) *Ante*, 75.

(*k*) *Ante*, 76.

(*l*) *Scumble*, Reg. Gen. Hil. T. 2 W. 4, reg. 8, *ante*, 110.

by the express terms the rule Hil. T. 2 W. 4, rule 11, and Mich. T. 3 W. 4, rule 5, 1832, he may after such payment have the costs taxed, and the excess, if any, refunded; and if more than a sixth be taxed off, the plaintiff's attorney is to pay the costs of taxation.

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7. If a sum larger than the debt really due be indorsed, or there be no indorsement, the prudent course will be for the defendant or his attorney, in the presence of a witness, or of two, for fear of the death of one, to tender the real amount and the costs, and if not accepted, to take out a summons why on payment of such real debt and costs the proceedings should not be stayed, or the defendant be at liberty to pay into Court such admitted sum and costs of the writ only; (l) but such summons, to avoid the costs of the draft of declaration, should be returnable within the first six days. (l) If such offer be made but not accepted, and still more, if such summons be obtained, although the judge cannot make an order whilst the plaintiff insists there is a larger sum due, yet it has been held in the Common Pleas (m) that where the offer has been made and refused, the Court will permit the defendant to pay the debt into Court, with the costs of the action up to the time of his offer only; and if the plaintiff take the money out of Court, he will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer. (n) In the King's Bench it was decided that in such a case if an offer of payment has been made before declaration, and the defendant after declaration paid money into Court in the usual course, and the plaintiff thereupon proceeded to take the same out of Court, then was the proper time for the defendant's attorney to apply to the Court, on affidavit of the facts, to limit the taxation of costs to those only of the writ. (n) If the action be in trover or detinue for specific articles of continuing equal value, as a deed, &c. an early offer to deliver up the articles, with costs to the time of such offer, and a sufficient sum for any supposed damages for the detention, might possibly be attended with similar advantage as respects costs subsequent to the offer, (o) especially in those cases of personal actions for

7. Consequence of an offer to pay a sufficient sum and costs to the time of offer, if not accepted.

(l) *Elliston v. Robinson*, 2 Crom. & M. 343; 2 Dowl. 241, S. C.; and see *ante*, 212 to 216; Bagl. Pr. Ch. 85, 211.

(m) *Seevin v. Cowell*, 2 Taunt. 103; *Roberts v. Lambert*, *id.* 283, S. P.; Tidd, 9th edit. 623, *ante*, 215.

(n) K. B. MS., Comyn for plaintiff, Chitty for defendant; *James v. Ruggell*,

1 Chitty's R. 471; 2 Bar. & Ald. 776, S. C.; 6 Moore, 430; 3 Brod. & B. 168, S. C.; *Chapman v. Drunning*, 1 Chit. 278.

(o) *Earle v. Holderness*, 4 Bing. 462; 1 Moore & P. 254, S. C.; Tidd, 9th ed. 544, 545. But see *Philipps v. Hayward*, 1 Harr. & Woll. 108; 4 Bing. 462.

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8. Time within which the defendant to appear after service.

damages in which the defendant is now at liberty to pay money into Court upon a judge's order. (*p*)

8. The form of writ of summons prescribed in schedule of 2 W. 4, c. 39, No. 1, commands the defendant "*that within eight days* after the service of this writ on you, *inclusive of* the day of such service, you do cause an appearance to be entered, &c.;" and the 16th section enacts that all proceedings as are mentioned in any writ, notice, or warning issued under that act, shall and may be taken in default of defendant's appearance, or putting in special bail, as the case may be. The day of the service, however late in the evening, is in this instance to be *included* in calculating the eight days, although the rule III. T. 1832, Rule VIII. orders that in general the prescribed number of days shall be reckoned *exclusively of the first day* and *inclusively of the last*, unless the latter fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving. The eight days' time for appearance are therefore to be reckoned *inclusively* of the first and last day, unless in the excepted cases.

9. The mode or form of entering an appearance by the defendant, or by his attorney, in King's Bench, Common Pleas, and Exchequer.

9. The 2nd section of 2 W. 4, c. 39, enacts, "that the *mode* of appearance to every writ of summons, or under the authority of that act, shall be by delivering a *memorandum in writing according to* the form contained in the schedule, such memorandum to be delivered to such officer as the Court out of which such process issued should direct, and to be *dated on the delivery thereof*. Three forms of appearance are prescribed in schedule No. 2, and to the following effect. One of these forms is to be adopted according to the facts of the case, as *first*, where a single defendant appears in person; *secondly*, where an attorney appears for a single defendant, or for all the defendants; and *lastly*, where an attorney for the *plaintiff* enters an appearance according to the statute 12 G. 1, c. 29, so that when one of several defendants appears separately, or where an attorney appears only for one of several defendants, a different form must be framed. We have seen that the schedule 2 W. 4, c. 39, No. 2, has prescribed three forms; the *first*, for an appearance by the defendant *in person*; *secondly*, an appearance for him by his attorney; and *thirdly*, an appearance entered by the *plaintiff* or *his attorney* for the defendant. Each of these is printed or lithographed on a

small piece of parchment of about five inches broad and four deep, with blank spaces for the insertion of the name of the Court, Christian and surnames of the plaintiff and defendant, name of the attorney who enters the appearance, and statement for whom he appears; and lastly, a blank in which the day when the appearance is entered is to be inserted.

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A., plaintiff, against C. D. { The defendant C. D. ap-
Entered the — day of —, A.D. 1835. { pears in person.

Forms of enter-
ing an appear-
ance as pre-
scribed by
2 W. 4, c. 39,
schedule No. 2.

Or,

A., plaintiff, against C. D. & others. { E. F., attorney for C. D.,
Entered the — day of —, A.D. 1835. { appears for him.

Or,

A., plaintiff, against C. D. & others. { G. H., attorney for the
Entered the — day of —, A.D. 1835. { plaintiff, appears for the
defendant C. D. accord-
ing to the statute.

It will be observed that when the appearance for a *defendant* has been entered by and in the name of *his* attorney, whose residence or place of business must have previously been entered in a public book, the plaintiff may, by resorting to such book, ascertain where and to whom to deliver the subsequent declaration and other proceeding, unless there should be several attorneys of the same name, in which case it might be necessary to apply to each to know which of them was authorized by the defendant, a trouble and inconvenience that might readily have been avoided if the form prescribed by the statute had required *the attorney's residence to be stated in the appearance*. But the form prescribed by the statute and schedule of an appearance by the *defendant himself*, without stating his residence, or where he will receive papers, is in that respect too general. (q) It will be obvious that when a defendant appears *in person*, and does not by his appearance designate any residence, *he ought to be required* to state where subsequent proceedings in the cause are to be left for him, for at present plaintiffs incur much difficulty; and even the declaration cannot

(q) See the difficulties that have arisen in serving declarations in consequence of plaintiff's ignorance of defendant's abode, and which might be avoided by requiring that defendant's appearance should em-

body a statement of his residence or place where the declaration and other proceedings may be left for him, Tidd, 9th edit. 457.

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be stuck up in the public office, when the residence of the defendant is unknown, without leave of the *Court* previously obtained, (r) the delay and trouble in obtaining which ought to be dispensed with when once the defendant has been actually served with process. However, the motion for such leave is absolute in *the first instance*; thereby evincing that as it is to be granted of course, no motion ought to be required. (s) Where the defendant had left his last place of residence before the service of the declaration, and which service was consequently irregular, the Court refused to declare it sufficient nunc pro tunc. (t)

In the *Exchequer* there was in force, before the 2 W. 4, c. 39, an *express* rule that on every appearance to be entered by the sworn or side clerks as officers of the office of pleas, they should cause to be put the name and *address of the attorney* at whose instance, and the day on which the same should be entered, and that such appearance should be entered by the defendant's name, by the said sworn clerks, in proper books, having an *alphabetical index book of reference* entered by the plaintiff's name, to be provided by the clerk of the pleas for each term, and which books should be open to the inspection of the said attorneys, admitted as mentioned in a foregoing rule of that term, and their clerks, without fee or reward. (u) And by another rule of the same term, "if the whole number of defendants, where there were several, should appear by the same attorney at the same time, the names of all the defendants should be inserted in one appearance. (x) But it seems that such rules were virtually annulled by the 2 W. 4, c. 39, s. 2, thus requiring a different and less explicit form of appearance to be adopted, and as given in the schedule No. 2. (y)

(r) R. G. Hil. T. 2 W. 4, r. 43, *Jervis's Rules*, 55. Why should not leave of a judge by order be deemed sufficient?

(s) *Bridger v. Austin*, 1 Dowl. 272.

(t) *Throughton v. Cramer*, 9 Legal Observer, 172.

(u) Rule Mich. T. 1830; 1 Tyr. Rep. 159. And see *Dax's Prac.* 35; *Price's Prac.* 199.

(x) *Id. ibid.*; 1 Tyr. R. 158. That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered an appearance therein according to the statute, and the defend-

ant shall, by an attorney of this Court, have given notice in writing to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, and summons, rules and orders, which, according to the practice of this Court, were heretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, shall be delivered to or served upon the attorney or attorneys of the other party, plaintiff or defendant, and that all notices, &c. shall be so served or delivered before nine o'clock in the evening.

(y) It might be advisable to authorize the use of the following forms, but until they have been sanctioned by the legislature, any practitioner might hesitate in deviating

It has been supposed that to serviceable process jointly issued against several defendants, they should enter a *joint* appearance and not appear separately; but it was held that if they do appear separately, that will not enable the plaintiff to declare separately. (z) When one of several joint defendants apprehends collusion between the other defendants and the plaintiff, or for some other reason wishes to defend separately, he should employ a different attorney and appear and plead and defend separately in every stage throughout the suit.

In the Exchequer it has been held, that appearances in person in a suit in the *King's Remembrancer's Office* may be recorded in Court without a fee to a clerk in Court; and Bayley, B. observed, though the ordinary course is to enter an appearance in the office by the agency of a clerk in Court, I have no doubt that an appearance in person in Court may be recorded; for every person has a right to appear in person according to process, without being compelled to employ an attorney to enter his appearance. (a) That decision, however, cannot affect the right of the respective officers to receive the fees prescribed by the general rule of Mich. T. 3 W. 4. (b)

In general a plea before appearance, even to a declaration *de bene esse*, or any other step, excepting the obtaining particulars of demand, or a summons or motion to set aside the

What plea or act of defendant before his appearance is a nullity or otherwise.

from the exact forms, *ante*, 283, as imperatively prescribed by 2 W. 4, c. 59, s. 2, and schedule No. 2, however insufficient those forms may be found.

In the K. B. [or C. P. or Exchequer].

A. B., Plaintiff, } The defendant C. D., residing at No. —, in — street, in
against } the parish of —, in the county of —, housekeeper (or
C. D. & E. F., Defts. } lodge, &c.) and the defendant E. F., residing at, &c. [like
description,] on this — day of —, A. D. —, appear in person to a writ of summons on promises, tested the — day of —, A. D. —, and all regular notices and documents left for them at those places will be forwarded to them and accepted by them.

Proposed new form of appearance in person.

Dated and entered this — day of —, A. D. 1835.

If the defendant should prefer not to state his residence, then his appearance might omit the statement thereof, but merely state *where all proceedings are to be left or served for him*.

The like, not stating the residence of the defendant.

A. B., Plaintiff, } Y. Z., of No. —, in — street, London, as attorney for the
against } defendants, (or "as agent for G. H., attorney for the defend-
C. D. & E. F., Defts. } ants,") on this — day of —, A. D. —, appears for the
said defendants respectively, to a writ of summons on promises, tested the — day of —, A. D. 1835.

Proposed new form of appearance by an attorney or agent for two defendants.

Dated and entered this — day of —, A. D. 1835.

(z) *Ante*, 185; *Pepper v. Whalley*, 1 1 Tyrw. 280.
Bingh. N. C. 71. (b) *Ante*, 160.
(a) *The Attorney-General v. Carpenter*,

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writ or copy, or service, would be premature. But it has been decided that a plea before appearance, being within the number of days allowed for pleading, is not such an irregularity as would entitle the plaintiff to sign judgment before the ordinary time of pleading has expired. (c)

Practical proceedings in entering an appearance for the defendant himself.

If the appearance is to be entered by or on the behalf of the defendant himself, the practice is to purchase at a stationers a *memorandum*, with all the unvarying parts printed or lithographed, on a small *square piece of parchment*, and in the first of the above forms leaving blanks for the insertion of all parts varying in each particular case. (d) The instrument is to be accurately intituled in the proper Court, as thus:—"In the King's Bench;" and the names and date are to be inserted according to the facts. The 2 W. 4, c. 39, s. 2, in terms requires that the memorandum be "*dated on the day of the delivery thereof*," i. e. the delivery to the proper officer of each Court.

Former proceedings as to filing warrant to defend.

Whilst the stamp duty on memoranda of warrants to sue or defend was in force under the 5 G. 3, c. 80, it was absolutely necessary that the same should be duly filed; (e) and it has been supposed that although the 5 G. 4, c. 41, repeals the duty, still the memorandum ought to be filed. (f) But the better opinion seems to be that such filing is no longer necessary. (g) It was the practice to prepare a *memorandum or minute of the attorney's warrant to defend* in the subscribed form, (h) and the same, (i) together with the above *memorandum of appearance* thus filled up, (if the appearance is to be entered in K. B.) was formerly taken to the *Appearance Office*, King's Bench Walk, Temple, No. —, and delivered to the clerk of the common bails there, and who entered the same in a

Offices in which to enter appearances.

(c) *Nolleken v. Severner*, 2 Tyr. Rep. 304.

(e) 1 Sellon Pr. 19.

(d) For the forms of common appearance before the uniformity of process act, see 1 Sellon Pr. 92.

(f) Price's Pr. 54.

(g) Tidd, 96; but see *ante*, 117, note (l), and 9 Legal Obs. 22, 23.

Minute of warrant to defend formerly filed.

(h) In the Court of —.

Middlesex to wit. J. K. is retained to defend by C. D. as his attorney, at the suit of A. B.

Entered or filed of record, this — day of —, in the — year of the reign of J. K., Defendant's Attorney.
O. P. [officer's name.]

[If by an agent, add by T. M. his agent.]

Entered or filed, &c. [same as above].

(i) See the former practice 1 Sellon, 92; and see *ante*, 117, that at least in C. P. the officer may still insist on the

filing of the warrant to defend before he permits any entry or proceeding.

public book kept there. If in C. P. the appearance was entered with the filacer of the county in which the residence of the defendant in the writ was described to be, and he filed such memorandum, and who entered the appearance in the appearance book there. If in the Exchequer, the parchment memorandum was taken to the office of the Exchequer of Pleas, at No. 9, in Lincoln's Inn Old Square, and there delivered to the filacer or his clerk, to be filed; and also an entry thereof was there made in a book of appearances. (k) And although the memorandum of the warrant to defend is discontinued, the same practice continues as to the document, and office, and mode of entering an appearance for the defendant.

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The general rule 2, of Mich. T. 3 W. 4, fixes that the *same fees* shall be paid in each Court at the time of delivery of the memorandum of appearance to the proper officer, viz. 1s, if only one defendant, and for every additional defendant 4d. Great care must be observed in correctly inserting in such memorandum the *name of the parties*, and also in entering the appearance with the *proper officer*; for otherwise the appearance might be treated as a nullity.

The fees on appearance.

The *consequences* of a defendant neglecting to cause an appearance to be entered for himself either by his attorney or in person, are principally two. *First*, by an express general rule, unless the defendant appear in person or by attorney or guardian, it shall *not be necessary to serve him with notice of taxing costs* in any subsequent state of the cause, (l) an exception probably introduced on the ground that a defendant, thus regardless of the process of the Court, is not entitled to a notice which would afford him an opportunity of eloining his goods. (m) *Secondly*, if the defendant do not appear, or should appear without stating his residence, then by leave of the Court notice of a declaration may be stuck up in the office, if the defendant's residence be unknown. (n)

The consequences of non-appearance.

The appearance should correspond with the writ of summons in the *names* and *number* of the parties; and if there should be *a material variance*, it may be treated as no appearance and a nullity. (o) But if a defendant has been misnamed in the pro-

The appearance must correspond with the process.

(k) Price's Gen. Prac. 69; Bagley's 92, note (g).

Cham. Pr. 86, n. (j).

(l) Reg. Gen. Hil. T. 4 W. 4, s. 18; 284.

Chitty's Concise View, &c. 63.

(m) See observations in Jervis's Rule

(n) G. R. Hil. T. 2 W. 4, r. 49; ante,

(o) 1 Arch. K. B. 4 ed. 527.

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cess, he may in the memorandum of his appearance describe himself correctly thus:—"E. D. served with a writ of summons in this action by the name of C. D.," or "E. D. sued as C. D.;" (p) and thereupon the plaintiff may declare against the defendant as "E. D. served with process in this suit by the name of C. D." (p) And if the defendant appear in the very name in which he was sued, then, however erroneous, the plaintiff may declare against him, and proceed by that name to judgment and execution, and take him or his goods by the wrong name. (q)

Appearance for
an infant.

If the defendant, or one of several defendants, be an *infant*, as he is supposed not to have sufficient discretion to select an attorney, or to direct the care of his defence, his appearance must be by *guardian*, (r) and who must be regularly appointed on petition, and by the order of a judge, to appear and defend as such guardian; (s) and it is the duty of a plaintiff's attorney to enforce such form of appearance, for an infant's appearance by *attorney* might afterwards be assigned as error; (t) and it seems that if an infant appear by attorney, and he upon request refuse to appear by guardian, the plaintiff's attorney may and ought to apply to the Court or a judge to order the appearance to be set aside, and that the defendant appear by guardian; (u) but such application may be made at any time before judgment. (x)

Proceedings to
enable plaintiff
to enter an

The 12 G. 1, c. 29, and 5 G. 2, c. 27, (to which the 2 W. 4, c. 39, s. 1 and 16, refers,) provide that if the defendant do not

(p) *Doe v. Butcher*, 3 T. R. 611; *R. v. Roper*, 6 Maule & Sel. 327, 339; *Hole v. Finch*, 2 Wils. 393.

(q) *Id. ibid.*; and *Crawford v. Satchwell*, 2 Strange, 1218.

(r) *Frescobaldi v. Kynaston*, 2 Stra. 784; Co. Lit 135 b.

(s) See T. Chitty's Forms, 626.

(t) *Shipman v. Stevens*, 2 Wils. Rep. 50; 2 Arch. K. B. 3rd edit. 676.

(u) *Hindmarsh v. Chandler*, 7 Taunt. 48; 1 Moore, 250; *Boys v. Edmeads*, 2 Chitty's Rep. 22; *Shipman v. Stevens*, 2 Wils. 40.

(x) *Shipman v. Stevens*, 2 Wils. 50; *Kerry v. Cade*, Barnes, 413.

The form of appearance by a *guardian* may, since the 2 W. 4, c. 39, sect. 2, be thus:—

Form of ap-
pearance by a
guardian for an
infant.

In the King's Bench,
Common Pleas,
Exchequer.

Y. Z., of —, as guardian of and for the said defendant, and O. P., of, &c. as attorney for the said Y. Z., appear for the said defendant to a writ of summons in this action, tested the — day of —, A.D. 1835.

{ A. B., plaintiff,
against
C. D., defendant.
Y. Z.
O. P.

Entered this — day of —, A.D. 1835.

duly appear, then the plaintiff may upon *affidavit* made and *filed* in the proper Court of the *personal service* of the process, *enter an appearance for the defendant*, and proceed the same as if the defendant himself had appeared.

The 3rd rule of Mich. T. 3 W. 4, A.D. 1832, we have seen, orders that the plaintiff shall not be at liberty to enter an appearance for the defendant unless the person who served the writ of summons shall have, within three days after such service, *indorsed* on such writ the day of *the week and month of such service*; and the same rule requires that every *affidavit* upon which such an appearance shall be entered, shall *mention the day* on which the indorsement was made. (y) The affidavit must also state the name or nature of the process served, as "a copy of a writ of summons," &c. and if it should be described only "as a writ of *mesne process*," the affidavit would be insufficient. (z) But in an action against husband and wife, if the husband alone has been served with a copy of process, the plaintiff may enter an appearance as well for the wife as for him. (a) The statute 12 G. 1, c. 29, in terms merely requires an affidavit of the personal service of a copy of the process, without requiring any oath that the writ or service was *regular*; but it will be seen from examination of the next form, that the deponent *usually* swears that the writ has been *regularly* issued, but perhaps that term need not be introduced. Subscribed is the usual form of such affidavit of *personal service*, which is adopted when it is supposed that the writ and copy, and manner of service, have in every respect been *regular*. (b) But when it is known or suspected that there has

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appearance for
the defendant;
see stat. i. c.
pursuant to the
statute 12 G. 1,
c. 29.
The necessary
affidavit of ser-
vice of process.

(y) See rule, *ante*, 160, note (n).

(z) *Lakin v. Dewall*, 1 Sellon's Prac. 98.

(a) *Collins v. Shapland and wife*, Barnes, 412; *Buncombe v. Love and wife*, *id.* 406; Prac. Reg. 351; 1 Sel. 91.

(b) See the forms before the 2 W. 4, c. 39; 1 Sellon, 98; Tidd's Forms; and see the more recent forms in Tidd's Third Supplement, 1832, page 61; Atherton on Personal Actions, Appendix; Price's Gen. Prac. 73; T. Chitty's Forms, 341; Chitty, senior's, Summary, 315 b.

The following form is that now *constantly* used in all the Courts in *ordinary* cases, and is to be purchased, either printed or lithographed, at the principal law stations.

In the Court of King's Bench,
Common Pleas,
Exchequer of Pleas.

Between { A. B., plaintiff,
and
C. D., defendant.

The usual form
of affidavit
made in the
country of the
personal service
of a *regular* writ
of summons.

G. H., of —, clerk to E. F., gentleman, attorney for the above-named plaintiff, maketh oath and saith that he this deponent did, on the — day of —, instant, [or last past,] *personally serve* the above-named defendant with a *true copy* of a writ of summons, which appeared to this deponent to have been *regularly* issued out of this Honourable Court against the said defendant at the suit of the said plaintiff, and bear-

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been any insufficiency or irregularity either in the terms of the writ or the copy, or in the service, that would render it incorrect to swear in such terms to the *regularity* of the writ, then it would obviously be improper to swear in such usual form; and the best course would be to *annex a copy* of the copy actually served, and to verify such copy, but omit the usual words "to have been *regularly issued*;" and the affidavit might be as subscribed, (b) but always strictly according to the facts. At all all events a *personal service* of a named document must be sworn to under 12 G. 1, c. 29, and it is questionable whether the Court would admit of any material deviation from the *ordinary* form. (c)

ing date the — day of —, A.D. 1835.* And this deponent further saith, that he did, on the — day of —, instant, [or last,] being within three days at least after such service of the said writ, indorse on the said writ the true day of the week and month, and the year of the said service, pursuant to the statute in such case made and provided.

Sworn, &c.

N. O.

A separate affidavit of an ineffectual search for the defendant's appearance, where the affidavit of the service has been sworn in the country, and the search is necessarily by another deponent in London.

In the King's Bench,
Common Pleas,
Exchequer of Pleas.

Between { A. B., plaintiff,
and
C. D., defendant.

G. H., of —, clerk to E. F., gentleman, agent for the attorney of the above-named plaintiff, maketh oath and saith that he did on the — day of —, instant, [or last,] duly search in the book kept for entering appearances in the King's Bench office [in King's Bench, or in Common Pleas, "by the filacer of the county of —," or in the Exchequer of Pleas, "in the office of pleas of this Honourable Court;"] for the purpose of ascertaining if any appearance had been entered for the defendant in this cause. And this deponent saith that no appearance hath been entered for the said defendant, as appears by the said book.

Sworn, &c.

G. II.

Form of affidavit of personal service, where it is supposed there has been some defect or irregularity in the process copy or service.

(b) —, of —, maketh oath and saith that he did on, &c. *personally* serve the above-named defendant with a *true copy* of a writ of summons, and another true copy whereof is hereunto annexed, and which said writ appeared to this deponent to have been *issued* [omitting the word *regularly*] out of this Honourable Court against the said defendant, at the suit, &c. [then proceed the same in other respects as above.]

(c) See the case of *Thompson v. Phenev*, before Patteson, J., and his judgment in Dowling's Statutes, 142. 143, in notes; where that excellent judge stated that a practice had crept in that the party seeking to enter a common appearance brought *any kind of affidavit*, which stated that the defendant had been served *personally*, and then set forth the particular mode of ser-

vice, which did not amount to personal service at all; that that course of proceeding was exceedingly improper, and he had given directions that it should be discontinued for the future. It is, however, still the practice to receive affidavits of *personal service*, without positively swearing to *regularity*.

* The above form, *constantly used*, omits any statement of the memorandum or indorsements, or of any further statement of the *mode* of service; but some of the printed modern precedents here add the following words:—"To which said writ and copy a memorandum was subscribed, and due indorsements were made thereon pursuant to the statute and rules of Court in that case made and provided, by his

this deponent's then delivering to the said defendant *personally a true copy of the same writ of summons* and memorandum subscribed, and of the several due indorsements made thereon pursuant to the statute and the rules of Court in such case made and provided;" and then conclude with the statement of the indorsement of the time of service as above.

It is not absolutely necessary to swear any affidavit of service until after the time for the defendant's appearance has expired, nor would the expense of preparing such affidavit be allowed if the defendant should tender the indorsed debt and costs before the expiration of the four days allowed for that purpose, or indeed if the defendant should appear before the plaintiff has entered an appearance *sec stat.*; so that in general the affidavit of service is not prepared until after the time for the defendant's appearance has expired. But it may, nevertheless, expedite proceedings when the service has been in the country, if the affidavit be sworn and forwarded to London immediately after the indorsement of the time of service has been made on the writ. The affidavit of service must not be sworn before the attorney for the plaintiff or his clerk. (d)

It will be observed that the statute 12 G. 1, c. 29, requires an affidavit of *personal* service, and such affidavit cannot be dispensed with; (e) and the practice of admitting any deviation from the *substance* of that affidavit has been recently condemned by Mr. Justice Patteson. (f) But as the statute prescribes *no express form*, and merely requires an oath of *personal service of the process*, and does not, at least in terms, require any oath that the process was in every respect *regular and sufficient*, it may suffice to swear to the name and description of the writ, and to verify an annexed copy, and swear to the service of a true copy corresponding with that annexed, thereby avoiding the *usual oath*, that such form was *in all respects regular* as above. But any affidavit substantially and materially deviating from the *usual form*, would probably not be received or acted upon at the office, and therefore it should seem that the person, before serving a copy of a writ, should examine the writ with the copy, and know enough of the law and practice to render it *morally proper* for him to swear to the regularity of the writ and indorsements. In the note is suggested a form in case the writ or copy served have been irregular in some small respect. (g)

(d) Rule 3, Hil. T. 2 W. 4; 1 Dowl. 184; Tidd, 242.

(e) *Pigeon v. Bruce*, 2 Moore, 462; 8 Taunt. 410; S. C. Tidd, 241.

(f) In *Thompson v. Phenev*, stated in 2 Dowl. Stat. 2 W. 4, c. 39, notes, page 142, 143; *ante*, 290, note (c).

(g) In the King's Bench,
Common Pleas,
Exchequer of Pleas.

Between { A. B., plaintiff, Suggested form
and of affidavit of
C. D., defendant. the personal
service of a
copy of a writ

Y. Z., clerk to E. F., of —, gentleman, attorney for the above-named plaintiff, maketh oath and saith that he did on —, the — day of —, instant, [or last,]

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Before whom
affidavit of ser-
vice may or
may not be
sworn, and of
enforcing
the swearing to
such affidavit.

By the third Gen. Reg. Hil. T. 2 W. 4, no affidavit of the service of process shall be deemed sufficient, if *sworn before the plaintiff's own attorney or his clerk*, (h) and by 6 Gen. Reg. Hil. T. 2 W. 4, where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received, and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself, but this rule shall not extend to affidavits to hold to bail. If the copy of the writ were served by a sheriff's officer, or any other person, the Court upon application would *compel him to make affidavit of service*; (i) the same as they will compel an attesting witness to swear to the execution of a warrant of attorney. (k)

How to enter
appearance for
the defendant
by the plaintiff.

At common law, there was no mode of enforcing an actual appearance by the defendant, and it was a maxim, that until he had actually appeared, no judgment in the action could be given against him in his absence, and we have seen that it has been recently decided that a *custom* in an inferior Court *to give judgment* in default of appearance is illegal and void, so that

of summons,
where the de-
ponent cannot
properly swear
to the *regularity*
of the writ or
copy. §

personally serve Mr. C. D., the above named defendant, with a *true copy* of a writ of summons, * which appeared to this deponent to have been issued out of and under the seal of this Honourable Court, at the suit of the above-named plaintiff, against the above-named defendant, and dated the — day of —, A.D. 1835, and to which said copy a memorandum was subscribed, and indorsements were made thereon to the best of this deponent's knowledge, judgment, and belief, *pursuant to the statute and the rules of Court in that case made and provided*, and a copy of which said original writ of summons, and of the said copy so served on the said C. D., and of all memoranda and indorsements thereon at the time of such service, is hereunto annexed, marked A. save and except as may appear in, by, or from such copy, on examination of the same. And this deponent further saith, that he did on the — day of —, last, [or instant,] being within three days at least after such service of the said copy of the said writ, indorse on such writ the day of the week and month, and year † of such service, being the day and year first aforesaid. ‡

Sworn at, &c.

Y. Z.

(h) See previous rules and practice, Jervis's Rules, 42.

(i) *R. v. Rudge*, 1 Bla. R. 432.

(k) *Clark v. Elwick*, 1 Stra. 1.

* The kind of writ that was served must it is said be described, and where it was merely termed a writ of mesne process, the Court set aside the proceedings even after judgment, 1 Sellon's Prac. 98. But *semble*, that the swearing to *personal* service of a *copy* of a copy *annexed* would suffice, and be preferable in case of doubt as to regularity; *sed quare*, if such last-mentioned affidavit would now be received. See Dowl. Stat. 2 W. 4, c. 39,

s. 1, note (b), page 142, 143.

† As to the year, see Price's G. P. 72.

‡ The affidavit of this indorsement is required by stat. 2 W. 4, c. 39, and rule Mich. T. 3 W. 4, s. 3. Of course there must also be an affidavit of the ineffectual search for the defendant's entry of his appearance, as *ante*, 290.

§ This is founded on 5 G. 2, c. 27, and the form is from Wordsworth's Rules, 142.

it is only in the superior Courts by modern *express-enactment*, that a mode has been devised of giving judgment in the action against an obstinate defendant in default of his appearance, and that only in the single case where the defendant has been *personally served* with the process, or where his goods have been taken under a *distringas*. (*l*) In part to remedy this evil, the 9 & 10 W. 3, c. 25, s. 33, (still in force but obsolete in practice,) authorizes the Court to give judgment to the plaintiff for a penalty of 5*l.*, with immediate execution in case the defendant does not appear; (*m*) and as the Court, upon affidavit and motion, would award execution for such penalty, the proceeding was useful, especially when the debt was small. (*pn*) But still the plaintiff *could not proceed further in the action*. To remedy this defect, the 12 G. 1, c. 29, s. 1, enacts, that in case the defendant do not duly appear, it shall be lawful for the plaintiff, upon affidavit being made and filed in the proper Court of the *personal* service of such process as aforesaid, which affidavit shall be filed gratis, to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if such defendant had entered his appearance or filed common bail; (*n*) and we have just seen that the form of an appearance so to be entered by the plaintiff is prescribed by 2 W. 4, c. 39, schedule No. 2. (*o*) Where, by mistake, the plaintiff entered an appearance for the defendant by a *wrong name*, the Court, upon motion, ordered the filacer to amend the appearance, the defendant's name being correct in the writ; (*p*) and where the defendant had got possession of the writ of summons, it was considered that the plaintiff might enter an appearance for the defendant without any indorsement of the claim for debt and costs, and the Court compelled the defendant to pay the costs. (*q*)

Consequences of mistake in entry of appearance sec. stat.

The statutes are silent as to the *time* to be allowed to the plaintiff to enter such appearance, and according to a recent decision there is a difference between the practice of the Courts of K. B. and C. P. and that of the Exchequer. In the former, the plaintiff must enter the appearance as of the term in which

Time within which such appearance according to statute may be entered.

(*l*) *Williams v. Lord Bagot*, 3 Bar. & Cres. 787.

(*m*) *Chitty's Col. Stat.* 50; *White v. Holland*, 2 Str. 737; *Gillb. K. B.* 369; *Anonymous*, 5 Mod. 592; 1 Clerk's Inst. 57; 1 Sellon's Prac.

(*n*) And see 43 G. 3, c. 46, s. 2; 51 G. 3, c. 124; 7 & 8 G. 4, c. 4, s. 130;

7 & 8 G. 4, c. 71; and *Chitty's Col. Stat.* 31, 32.

(*o*) *Ante*, 283.

(*p*) *Whetson v. Packman*, 3 Wils. 49; *Goodright v. Wright*, 1 Stra. 33; *Stratton v. Burgis*, *id.* 114; *Power v. Jones*, *id.* 445.

(*q*) *Brooks v. Edridge*, 2 Dowl. 647.

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the writ was returnable *before the end of the vacation* of the following term, and cannot do so afterwards. (r) But in a subsequent case, the Court of Exchequer decided that the plaintiff *has four terms* in which to enter a common appearance according to the act 12 G. 1, c. 29, s. 1. (s)

Course of practice upon entering an appearance by the plaintiff for the defendant, according to 12 G. 1 c. 29.

The practical proceedings to enter an appearance by the plaintiff for the defendant is to obtain *an affidavit* of the *personal service* of a copy of the writ of summons, and of the day on which the indorsement of the day of service was made, as above pointed out, (t) and after the expiration of the eight days allowed the defendant to appear to *search for* and make an *affidavit of the ineffectual search* at the proper office for the entry of an appearance by the defendant himself or his attorney for him. (u) A memorandum should then be made on a piece of parchment, usually about five inches broad by four inches in depth, of the form of entry of an appearance by the plaintiff for the defendant, and dated of the day when it is delivered to the proper officer, (v) and it may be in the following form. (x)

In the Court of —		
A.	against	<div style="display: inline-block; vertical-align: middle;"> plt. { appears for the defendant, C. D. according to the statute. </div>
C. D. E. F. & G. H. defts.		
Entered the — day of —, A. D. 1835.		

The affidavits of personal service of the copy of the writ of summons, and of the ineffectual search at the proper office for the defendant's appearance, and this memorandum, after a very recent and careful search with the clerk of common bails in K. B., and the filacer for the proper county in the Common Pleas, and at the Exchequer office in Lincoln's Inn, when the writ of summons is from the Court of Exchequer, so as to ascertain with certainty whether the defendant has entered his appearance, are to be taken to one of those offices, according to the Court out of which the writ has been issued, and the proper officer will receive the affidavit and memorandum and file the same, and also *enter the appearance* sec. stat. in a proper book,

(r) *Budgen v. Burr*, 10 Bar. & C. 457; 1 Sellon, 98.

(s) *Cook v. Allen*, 3 Tyr. 378; *sed quare*; see Price Gen. Pr. 64, 5, in note.

(t) *Ante*, 289, 290, in note.

(u) *Ante*, 290.

(v) 2 W. 4, ch. 39, s. 2.

(x) And see *ante*, 283.

precisely as if the defendant had himself entered his appearance, although in a different form. (y)

If, after the defendant has entered his appearance in due time, the plaintiff's attorney should inadvertently overlook the same in his search, and file an appearance sec. stat. and give notice of declaration to the defendant, the defendant must object to that irregularity in due time after such notice, or a judgment signed against him would not afterwards be set aside. (z)

The plaintiff must enter the appearance for the defendant by the *same name* stated in the process, and if a misnomer be discovered, still the plaintiff should enter the appearance in the wrong name, the same as in the writ, and declare against him by the same name; and as the defendant cannot, since the 3 & 4 W. 4, c. 42, s. 11, plead his misnomer in abatement, the only inconvenience would be a summons under that section, compelling the plaintiff to state the proper name in the declaration, and to pay the costs of the summons and order. It would be irregular for the plaintiff to enter the defendant's appearance in his correct name; (a) and it has been considered that the plaintiff cannot, after appearing for the defendant in the name in the process, declare against the defendant by his right name; (b) but since the above enactment that point may perhaps be doubtful. (c)

An appearance entered by plaintiff for defendant sec. stat. must exactly correspond with process in names, &c. or consequences.

We have seen that there is a sensible distinction in practice between cases where the defendant, in due respect to the process of the Courts, has himself appeared, and a case where he has neglected to appear, and has put the plaintiff to the additional trouble and expense of making an affidavit of the personal service of process, and entering an appearance for the defendant, viz., that in the latter case the defendant having evinced

(y) See 2 W. 4, c. 39, s. 2.

(z) *Rutty v. Auber*, 3 Tyr. 591. An appearance was entered by the defendant in due time on 10 Jan.; but not being found in the appearance book, on search by the plaintiff's attorney, he entered a common appearance for him on the 21st, and proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. The plaintiff signed judgment on 4th February, and levied execution thereon on the 19th. The defendant's attorney then said, that he had entered an appearance for the defendant, and it was decided, that though that entry of appearance made the demand of plea

necessary, yet, as the plaintiff's attorney was suffered to remain in ignorance of it, after he had committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed on 26 January, the judgment must stand.

(a) *Doe v. Butcher*, 3 Term R. 611; *Greenslade v. Rother*, 2 New Rep. 132; *Dring v. Dickenson*, 11 East, 225.

(b) *Id. ibid.*; and *Delaney v. Cannon*, 10 East, 328; *Mestaer v. Hertz*, 3 M. & Sel. 45, *sed quare*.

(c) *Semble*, for why may not the plaintiff anticipate and prevent the very ground of complaint to which the 3 & 4 W. 4, c. 11, relates?

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no respect towards the process of the Courts is not entitled to any notice of the intention to tax costs, which would only afford him an opportunity of removing his goods to avoid process. (d)

Of declaring on
a writ of sum-
mons.

Although the practice appertaining to declarations will be considered in a subsequent chapter, yet it may here be proper to notice, that since the uniformity of process act, 2 W. 4, c. 39, s. 3, extends the right of the plaintiff to enter an appearance for the defendant as well to writs of *distringas* as to serviceable process, it has been observed, that it is *unnecessary* for a plaintiff to declare *de bene esse* or conditionally upon a mere serviceable *writ of summons*, and therefore that mode or time of declaring is now confined to *bailable* process by *capias* or *detainer*; (e) and, indeed, it would not only be *unnecessary*, but *irregular*, to declare *de bene esse* on a writ of summons, (f) for this technical reason, viz. that that mode of declaration was, by the terms of the rule permitting it, *confined* to process *against the person*, whether *bailable* or not; (g) and that a writ of summons or *distringas* under the 2 W. 4, c. 39, is not to be considered process against the *person*, the former being merely a *summons*, and not commanding the sheriff to take the *body* of the defendant, and the latter being obviously only a proceeding against the defendant's *goods*. When a *capias* has been issued against several defendants, and one of them has not been arrested, but only served with a copy of the process, as he may be under the 5th section of 2 W. 4, c. 39, then there is an express rule authorizing a declaration *de bene esse* against the defendant thus served. (h)

The *form* of commencing a declaration as it is affected by the process to which the appearance has been entered, when that process has been a *writ of summons*, has been prescribed by the gen. rule, Mich. T. 3 W. 4, r. 1, and after the title of the Court, and statement of the day of filing or delivering the

(d) *Ante*, 287.

(e) Tidd's Supp. 1832, on the uniformity of process act, page 39, Tidd, Supp. 1833, p. 123.

(f) So argued in *Fish v. Palmer*, 2 Dowl. 461; 1 Arch. C. P. [68]; Jervis's Rules, 30, n. (u), but not decided. In 1 Arch. C. P. [68], it is stated that it would be *irregular*, and see Jervis's Rules, 30, n. (u); and see the question fully discussed as to any possible right to declare *de bene esse* on a writ of summons or *distringas* in Atherton on Personal Actions, 94, 98, 102, and *infra* next note;

sed *quare* the principle, for a serviceable *latitat* was in effect as much a *summons* as the present writ of summons, and certainly a plaintiff might always have declared *de bene esse* on such *latitat*.

(g) See rule Trin. T. 22 G. 3; R. M. 10 G. 2, Tidd, 9 ed. 419; Atherton, Personal Actions, 94 and 98 and 102, *very distinct on this point*; 1 Arch. K. B. 4 ed. 215, 217; 1 Arch. C. P. [68]; but see Tidd, 9 ed. 454 to 456.

(h) R. M. 3 W. 4, r. 11; *Wendover v. Cooper*, 10 Bar. & Cres. 614.

declaration, is thus, [*Venue*]. "A. B. by E. F. his attorney, [or in his own proper person] complains of C. D. who has been *summoned* to answer the said A. B., &c ;(i)" and in all other respects the proceedings in the action are the same, whatever may have been the form of process.

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(i) The rule of Mich. T. 3 W. 4, in giving the form, stops at the, &c. thus leaving it uncertain whether it was intended that the *form of action* mentioned

in the writ should be here inserted in the *declaration*. It is usually inserted. See the chapter on declarations, *post*.

CHAPTER VII.

OF THE WRIT OF DISTRINGAS AND PROCEEDINGS THEREON.

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1. How regulated by 2 W. 4, c. 39, s. 3, and schedule No. 3.

A writ of *distringas* we have seen is one of the *secondary* writs of mesne process, issued only in *furtherance* of the same object as a writ of summons, viz., to *enforce the defendant's appearance* in cases where a plaintiff has not been able to serve him *personally* with a copy of a writ of summons, after *three* several attempts to do so, and it must always be preceded by a *writ of summons* and bona fide endeavours to serve the same, and it is never preceded by a writ of *capias*. But when a writ of distringas has been obtained, then, although by the *terms* of such writ itself the sheriff is only commanded to *distrain the defendant's goods*, yet he is by the enactment in 2 W. 4, c. 39, s. 3, also required to *serve the defendant* with a copy of the writ, with the subscribed notice to appear, if the sheriff or his officer *can meet* with the defendant, and if not, he is then to leave such copy at the place where he makes the distress. (a) So that in effect a distringas has in all cases a *double operation*, viz., not only to *serve* the defendant with notice to appear, but also to induce or *enforce* his observance, by seizing and detain-

(a) 2 W. 4, c. 39, s. 3.

ing his goods; and if the sheriff should thereupon *either* distrain upon the defendant's goods, or serve him personally with a copy of the distringas, then, according to the terms of the notice at the foot of the distringas, and the enactment in the 16th section, (viz., that all notified proceedings may be had according to the notice,) it follows that in either of those cases, if the defendant do not himself appear, the plaintiff may, *as of course*, upon a proper affidavit of the facts, enter an appearance for the defendant sec. statute without obtaining the leave of the Court or a judge for that purpose. (b) But if the sheriff can *neither* distrain *nor* serve the defendant personally, and he return *in the conjunctive* nulla bona and non est inventus, then the plaintiff must apply to the Court for leave to *enter an appearance* for the defendant and proceed in the action, or for leave to proceed to *outlawry*. It will be observed that the form of the writ of distringas, as prescribed in the schedule of 2 W. 4, c. 39, No. 3, *may* give the defendant notice either that the plaintiff will proceed to enter an appearance for him or proceed to outlawry; but the writ must not be framed in the alternative; and the plaintiff, before applying for the writ of distringas, must, according to the facts of the case, make and declare to the Court or judge which course of proceeding he will adopt, and the writ must be confined to that limited object. (c)

In all cases there must have been a *writ of summons* before a writ of *distringas* can be issued; for the 3d section of 2 W. 4, c. 39, provides, that when it shall appear by *affidavit* to the *satisfaction* of the Court *in term*, or a judge *in vacation*, that the defendant has not been *personally* served with a *writ of summons*, and has not appeared, and cannot be compelled so to do, without *some more efficacious process*, then the Court or a judge *may order a writ of distringas* to be issued, *directed* to the sheriff of the county wherein the dwelling-house or place of abode of the defendant is situate, *or* to the sheriff of any other county, or to any other officer to be named by such Court or judge, in order to compel the appearance of the defendant. The same section directs that the writ and notice shall be in the *forms prescribed* in the schedule No. 3; and shall be *tested* on the day of issuing, and shall be *returnable in term* at least fifteen days after its teste, and that a copy shall

(b) *Johnson v. Smeulley*, 1 Dowl. 526,
555, *post*, 315, 316.

(c) *Fraser v. Case*, 9 Bing. 464.

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be *served* on the defendant, if he can be met with, or *if not*, shall be *left* at the place where such distringas shall be *executed*. A true copy of such writ and notice is also required to be delivered with the writ itself to the sheriff or other officer, in order that he may deliver the same to the defendant. It is then enacted that if such writ shall be returned in the conjunctive, *non est inventus and nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, and the *defendant shall not appear* at or within eight days *inclusive* (d) after the return, and it shall be made appear *by affidavit that due and proper means have been taken to serve and execute such writ*, (i. e. to serve a copy on the defendant and to distrain his goods,) *the Court or a judge* may authorize the plaintiff *to enter an appearance for the defendant and proceed thereon to judgment and execution.* (e)

2. The case in which a distringas is proper to enforce an appearance.

2. The *use and propriety* of applying for a writ of *distringas* varies according to circumstances. If a party, having a residence or any home or tangible personal property that can be distrained, and being himself in *England*, has evaded the personal service of a writ of summons, then a writ of *distringas to compel an appearance* is the proper *secondary* process, and if the sheriff can neither serve him personally with a copy of such *distringas* in the manner prescribed, nor distrain upon his personal property, then if on a return of both those facts, i. e. *non est inventus and nulla bona*, and if the defendant do not appear within eight days, the plaintiff may, *by leave of the Court or a judge*, enter an appearance for him, according to the statute 12 G. 1, c. 29. (f) So even in cases where the defendant is abroad, yet if he carry on trade or keep an establishment in this country, the Court or a judge may order a *distringas* to issue to compel his appearance, though not to outlaw him. (g)

The cases in which that writ is proper to found proceedings to outlawry.

If the defendant *cannot be found in England*, under any circumstances, or it can be sworn that he is *staying abroad*, whether for delay or not, or if it cannot be ascertained after due

(d) The eight days for defendant's appearance are to be calculated from the *last*, usually the third attempt to serve him inclusive of that day, *Brian v. Stretton*, 1 Dowl. 642.

(e) Observations have been made on some inaccuracies in this act, and in the forms prescribed, which it may be useful for students to examine. See Price's Gen. Pr. 37 to 66. Certainly it is singular that

in the body of the writ the sheriff is not required to serve the defendant personally, nor is the defendant required to appear, but the principal authority is confined to making distress.

(f) Price's Gen. Pr. 51, 52.

(g) *Hornby v. Bowling*, 11 Moore, 369; *Gurney v. Hardenborough*, 1 Taunt. 487; *Fraser v. Case*, 9 Bing. 464.

inquiry *whether he is in England or not*, or whether he have *any distrainable property* here; then also (though upon a *differently framed affidavit*) the issuing a *distringas* will be proper; (*h*) but in the latter case the writ must be applied for *professedly*, in order afterwards to proceed to outlawry, under the *5th section* of the act, and the plaintiff will not in that case be enabled to enter an appearance according to the statute. (*i*) And counsel, on moving the Court, or an attorney on applying to a judge in vacation for a writ of *distringas*, must declare his election for what purpose it is to be issued, i. e. whether for the purpose of the plaintiff's entering an appearance for the defendant according to the statute, or in order to outlaw the defendant. (*k*) It seems to have been the intention of the legislature not to allow a *distress* upon a party's goods, unless it be shewn that after all reasonable endeavours he could not be *personally served* with process; nor to allow *outlawry*, unless it appear that the defendant could *neither be served nor distrained upon*, so as to endeavour to enforce an appearance by less prejudicial means than outlawry. (*l*) But since the 2 W. 4, c. 39, if a defendant or one of several defendants cannot be personally served, nor has any goods, he may be proceeded against to *outlawry*, whether or not he be in the kingdom, (*m*) although before that act it was held that an outlawry was void (that is *voidable* on terms) if the defendant had previously left the kingdom. (*n*)

3. The proceedings to obtain a *distringas* principally vary according to circumstances *in four different cases*; 1st, when a defendant has a known residence in England, either at his house or lodgings, and is supposed to be occasionally there and his goods can there be found; 2dly, where he has such general known residence but is *out of the kingdom*; 3dly, where the defendant has *not any known residence* but is supposed to be in England; 4thly, when the defendant has neither residence nor goods but is out of the kingdom.

3. The practice in obtaining a *distringas* first to enable plaintiff to enter an appearance for defendant. (*o*)

(*h*) *Moon v. Thynne*, 3 Dowl. 153.

(*i*) *Morgan v. Williams*, Price's Gen. Pr. 53, in notes.

(*k*) *Fraser v. Case*, 9 Bing. 464; Price's Gen. Pr. 58.

(*l*) Price's Gen. Pr. 52, 53, 56.

(*m*) 2 W. 4, c. 39, s. 5.

(*n*) *Bryan v. Wagstaff*, 5 Bar. & Cres. post, 314.

(*o*) It is to be kept in view that much of the old practice of the Court of Exchequer on proceedings upon a *venire*, as to the requisites of the proceedings and

of the affidavit in order to ground a motion for a *distringas* after a writ of *venire*, now applies to the new process by writ of summons, *Johnson v. Rouse*, 3 Tyr. 161; 1 Crom. & M. 26; Wordsworth's Rules, 74, note (*f*); and the Court used to require an affidavit almost irresistibly shewing that defendant kept out of the way to avoid service of the *venire* when that process was in force, *Pitt v. Elted*, 1 Tyr. 128; *Winstanley v. Edye*, id. 276; *Godkin v. Redgate*, id. 287.

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1st case, Where defendant has a known residence in England and is supposed to be occasionally there.

The requisite endeavours to serve the defendant *personally* with the writ of summons.

The *first* is the most usual state of facts, and then the proceedings will be as follows: it will be observed, that in order to induce the Court or a judge to order the issuing a writ of distringas the statute 2 W. 4, c. 39, s. 3, renders it indispensable that a writ of summons in due form and with all proper indorsements shall have been *first* issued, and that it shall appear by *affidavit* to the *satisfaction* of the Court or a judge that the defendant *has not been nor can be personally served* with a copy of such writ, shewing with particularity the several attempts that have been made to effect such service; so that at all events a writ of summons must be first issued, and *diligent enquiries and attempts duly made* to serve the same *personally* on the defendant. It seems, however, that the attempts to serve a summons, in order to found a writ of distringas, may be different to those usually adopted when it is expected that a personal service may be effected. In the former case we have seen that even *delusive* or deceptive means may be properly adopted so as to entice the defendant to a meeting and then *personally* to serve him with a writ of summons; (o) but when it has been ascertained that there is no prospect of effecting or being able to deliver a copy of the writ of summons to the defendant in person, then, in order to avoid loss of time by ineffectual devices to obtain such meeting, it is advisable, even in the *first instance*, to act *explicitly*, and to deliver at the defendant's residence, to his wife or other member of his family or servant there, who would, under ordinary circumstances, be most likely to forward the communication to the defendant, a full statement of the particular object, and desire personally to serve the defendant, (and this even with a copy of the process on the first attempt, though not absolutely necessary to be left till the *last call*,) in order afterwards to shew to the Court that the defendant probably has received intimation through such relative of the object in view and that he *wilfully* avoids personal service, and therefore by his own conduct renders *more efficacious process essential*, as contemplated by the 8th section of the act.

The proper proceedings to be adopted, as settled by decisions, and to be collected from the usual forms of affidavit (one of which is subscribed), in order to *satisfy* the Court or a judge that due diligence has been ineffectually used, is for the plaintiff's attorney or one of his most intelligent clerks, or some other well informed practitioner, to make at least *three* (q)

(o) *Ante*, 270, note (r).
(p) *Post*, 307, note (o).*

(q) *Fisher v. Goodwin*, 2 Crom. & J. 94.

separate calls at the defendant's residence. The 2 W. 4, c. 39, is certainly silent as to the requisite number of calls, but that number has been adopted with analogy to the previous proceedings on a *venire* when *that number of attempts* was considered requisite, (g) and such calls must be distinctly stated in the affidavit, (r) and be either at the defendant's house or his lodgings and not merely at the office of his employer when he is a clerk, (s) and at hours when on each call it is most probable he will be met with there, and the party calling should on each occasion have in his possession the original writ and an exact copy ready immediately to produce and shew to the defendant, and it has been recommended that each call should be made on *separate days*, though it seems that all the calls may under circumstances be made on the same day; as where the affidavit establishes that the defendant purposely keeps out of the way. (t) But the *three calls* may be made by *different persons*. On each call application should be made to see the wife, relative, or most confidential clerk or servant, being an inmate, of the defendant, and *residing there* with him; and the party should produce the writ and copy on each occasion, (u) and also request to see the defendant; and he should fully communicate to such wife or other person the particulars of the writ, and distinctly state that the object of the call is to serve the defendant personally with a copy of the writ at the suit of the plaintiff or plaintiffs, naming them; (x) and it has even been said that on the *first* call a copy of the writ should be left, but according to the most recent decisions it suffices to leave such copy on the *last*, being usually the third call. (y) At the *first* call full inquiries should be made of the wife or other inmate, when it is most likely that on the same or the next or very early day afterwards, the defendant will be at home, or where else; and an appointment should be made to meet him accordingly; (z) and such appointment should be punctually kept; (s) and on this *second call* the like formal proceedings should take place, and another

(g) Wordsworth's Rules, 74, note (f); and see *Thomas v. Thomas*, 2 Moore & S. 730; *Johnson v. Rouse*, 1 Cromp. & M. 26.

(r) *Bowser v. Austen*, 2 Crom. & Jerv. 45.

(s) *Thomas v. Thomas*, 2 Moore & S. 730.

(t) *White v. Western*, 2 Dowl. 451, 457; 7 Legal Ob. 701; 9 Legal Ob. 197.

(u) See observations of Bayley, B., in *Street v. Ld. Alvanley*, 1 Dowl. 638; *Anon. id.* 513; *Hill v. Mould*, 3 Tyr. 162;

2 Dowl. 10; and an anonymous case, Price Gen. Pr. 76, 77, in notes.

(x) *Johnson v. Rouse*, 1 Crom. & M. 26; 1 Dowl. 641; Wordsworth's Rules, 75.

(y) *Post*, 304, note (n).

(z) *Id. ibid.*; *Johnson v. Disney*, 3 Dowl. 400; *Wills v. Bowman*, *id.* 413; *Coet v. Willis*, 5 Legal Ob. 144; *Johnson v. Rouse*, 1 Cro. & M. 26; 3 Tyr. 161; 1 Dowl. 641, S. C.; *Atkins v. Lowther*, 5 Legal Ob. 144; *Simpson v. Ld. Graves*, 2 Dowl. 10; 6 Legal. Ob. 45, S. C.

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appointment at the most probable time of meeting the defendant should be made; and such appointment also should be punctually kept.

On the *last of the three calls* the like inquiry to see the wife or other inmate of the defendant, and also to see him, should be made, and the purpose of the call should be again fully stated, and an exact *copy* of the writ of summons and indorsements must then be delivered to the wife or servant or other inmate at the defendant's residence, with a request that the same may be immediately delivered to the defendant or forwarded to him by the earliest safe conveyance. (a) The least omission or mistake in the copy left, if altering *the sense*, would render the proceeding irregular; but not an omission of a letter or a variance which did not alter the sense nor could mislead the defendant. (b) The answers given on each occasion must be carefully minuted down and fully stated in a subsequent affidavit. (c)

It might also be advisable on the *first* occasion to address to and leave for the defendant a *civil letter*, stating the object of the call, with an assurance that the process is notailable, but that it will be necessary to effect personal service, and that the defendant will incur increased expense and annoyance by proceedings to outlaw him or a seizure of his goods, unless he permit personal service and do appear. (d) It is always essential that the three several attempts to serve the writ of summons should be made by an intelligent clerk well acquainted with the requisite practice; but it is not necessary that each of the three calls should be made by the same person. (e) However, it may save trouble and the necessity for several affidavits, if the whole proceeding be conducted by one person. As the proceedings must be made with a bona fide view to serve the defendant personally if possible, they will necessarily vary according to circumstances, and although in general there should be *three* distinct applications, yet it has been held that *one only*, coupled with other circumstances, and satisfying the Court by affidavit that the defendant *purposely* keeps out of the way to

(a) *Hill v. Mould*, 3 Tyr. 162; 1 Crom. & M. 617; 2 Dowl. 11, S. C.; *Street v. Albanley*, 1 Crom. & M. 27; *Balgay v. Gardner*, 2 Dowl. 52; *Turner v. Smith*, 1 Moore & P. 557; but in *Fraser v. Case*, 9 Bing. 464, the Court did not observe on the omission in the affidavit of that statement; and see *Smith v. Macdonald*, 1 Dowl. 688.

(b) *Ante*, 231; *Tyser v. Bryan*, 2 Dowl. 640; *Hodgkinson v. Hodgkinson*, *id.* 536; *ante*, 229 to 233, 261.

(c) *Pagden v. Kelly*, 1 Legal Ob.; *Tidd's Sup.* 79; *Wordsworth's Rules*, 75.

(d) See *Price's Gen. Pr.* 48, 49, and affidavit in appendix of forms.

(e) *Smith v. Good*, 2 Dowl. 398.

avoid process, may suffice to induce the Court to order a distringas. (f)

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After such three unsuccessful attempts to serve the writ of summons, the plaintiff's attorney must wait at least *eight days* from the time of the *last* call when a copy of the writ was left, before he can proceed further, or move for a distringas. (g) On or after the *ninth day* the plaintiff's attorney ought very carefully to *search* at the proper office of the Court for the entry of the defendant's appearance. After an unsuccessful search for the defendant's appearance, an *affidavit* is to be prepared and sworn, stating such search, and that no appearance has been entered by or for the defendant in the named proper office. When the attempts to serve the summons have been made at a distance in the country, the *affidavit of such attempts* is usually made separately from that of the search for the appearance, which is usually prepared and sworn in London.

2. Search for defendant's appearance, and requisite *affidavit* on which to apply for a writ of distringas.

As the statute directs that the Court or a judge "shall be satisfied that more efficacious process is necessary" before they order a distringas, the judges require a *very full affidavit*, stating in general the proceedings before suggested, viz. that the deponent having with him a copy of a writ of summons regularly issued, (or in a case where the regularity of the writ or copy is doubted, annexing and verifying the same,) (h) attended at the *residence* of the defendant, shewing whether it was his house or lodgings, and its precise situation, (i) and then shewing that the deponent saw some inmate, and stated his object; and the answer and appointment for calling again, and that two other similar calls were made, stating what passed, and that on the last call a copy of the writ was left for the defendant, with directions to forward the same to him; and lastly, the deponent must not merely swear to his *belief* that the defendant keeps out of the way, but must shew the *very causes or grounds* of such belief, in order that the Court or judge may ascertain their *sufficiency*; and on that account the affidavit should shew that the defend-

The requisite affidavit.

(f) *White v. Western*, 2 Dowl. 431; 7 Legal Ob. 701, S. C.; Price's Gen. Pr. 48; referring to a case decided in Exchequer in Nov. 1832, and *Anon.* 1 Price's notes of Points Prac. Ex.; see also *Thomas v. Elder*, Price's Gen. Pr. 49; but see Tidd's Sup. A. D. 1833, p. 73, 79, as to the necessity for three calls.

(g) *Brian v. Stretton*, 1 Crompt. & M. 74; 3 Tyr. 163, S. C.; Tidd's Supp. 1833, p. 78; 9 Legal Observer, 197.

(h) See suggested form, ante, 291, note (g).

(i) *Pitt v. Elved*, 1 Crompt. & Jer. 147; *Bowser v. Austin*, 2 id. 45; *Searborough v. Evans*, 2 Dowl. 9.

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ant was at home or in the neighbourhood at the time of the first call, or between that time and the last call, or very soon after, so that most probably he heard of the applications before the last day, or before the day on which he should appear. (j) The affidavit then states, that the deponent in due time and when, in pursuance of the rule of Court, indorsed the time of leaving the writ at the defendant's residence; and if the same deponent has searched the office for the defendant's appearance, the affidavit concludes with a statement of the time of the ineffectual search. (k)

It has been supposed to be necessary to set forth the *tenor* of the writ of *summons* in the very words, (l) but those decisions were before the 2 W. 4, c. 39; and although some forms still set forth, or even annex a copy of the writ, others do not, but merely state that the writ of *summons* and copy were *regular*; the same as in the long established form of an affidavit of *actual service* of a writ of *summons*. (n)

Suggested form
of affidavit to
obtain a distrin-
gas.

The *forms* of affidavits in order to obtain a *distringas*, and thereupon afterwards to enable the plaintiff to enter an appearance for the defendant as given in the books, vary considerably. (n) The subscribed form is suggested as most comprehen-

(j) *Turner v. Smith*, 1 Moore & Payne, 557; *Hornby v. Bowling*, 11 Moore, 371; *Johnson v. Rouse*, 1 Crompt. & Mee, 26; 1 Dowl. 641, 720; 3 Tyr. 161; *Anonymous*, 1 Dowl. 513, 641; *Price v. Bower*, 2 Dowl. 1, 7, 9, 10, 225; and see cases Price's Gen. Prac. 76 to 79, in note. In *Scarborough v. Evans*, 2 Dowl. 9, the Court said, "your affidavit is insufficient in not stating that you have endeavoured to serve the defendant at his present place of abode; you do not negative a knowledge of any other place of abode, nor do you state that you cannot find him. You ought to state the grounds for believing that he cannot be found."

(k) See Tidd's Supp. 1833, p. 78 to 80, and see Wordsworth's Rules, 75, a statement of the proceedings to obtain a writ of *distringas*.

(l) *Hill v. Wilkinsan*, 4 Taunt. 619; *Hannon v. Dietrichsen*, 5 Taunt. 853.

(m) Mr. Atherton, in his work on Personal Actions, Appendix, xxxviii. n. (c), and xli. n. (d), observes, that "the

annexation of the writ is unnecessary; and that as the writ itself might afterwards be required for other purposes, e.g. to be entered of record in case the statute of limitations should be pleaded, it might be injudicious." Supposing, however, that there is any known informality in the writ of *summons*, or the issuing thereof, or in the copy or service, then as a deponent might not with propriety be able to swear, as usual, that the writ of *summons* appeared to him to have been regularly issued, then it might be preferable to annex a copy, and then state the several endeavours personally to serve the defendant; and see suggestions, *ante*, 291, 2, in a case where it is doubtful whether the writ of *summons* was regular.

(n) See forms, Tidd's Supp. 1833, p. 265; Price's Gen. Pr. 44, and other forms there referred to; T. Chitty's Forms, 343; Atherton's Personal Actions, xxxviii.; Wordsworth, 142; Mansell, 35.

sive, and probably sufficiently complying with the terms of the statute, and the rules and decisions thereon.(o)

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(o) In the King's Bench [Common Pleas, or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

2. General form of affidavit to obtain distingas.

G. H. of — in the county of —, clerk to E. F. of the same place, attorney for the above named plaintiff, maketh oath and saith, that he, this deponent, as such clerk, and by the direction of the said E. F. did on the — day of — instant [or last past] attend at the dwelling house and residence of the above named defendant, situate and being No. — in — street, in the parish of —, in the county of —, for the purpose of serving the said defendant with a true copy of a writ of summons, and of the memorandum and indorsements thereon, and whereby the said defendant was commanded within eight days inclusive, after the service of the said writ on him, to cause an appearance to be entered for him in this Honourable Court in an action on promises [or "of debt," &c. as the case may be], at the suit of the said plaintiff; and in which writ was contained a notice to the said defendant, that in default of his so doing, the said A. B. might cause an appearance to be entered for him, and proceed thereon to judgment and execution; and which writ of summons appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court against the said defendant, at the suit of the said plaintiff, on the — day of — instant [or "last past," being the teste day of the writ];* and which said writ and copy were then and at all times hereinafter mentioned in the possession of this deponent ready to be immediately produced and shewn to the said defendant. And this deponent further saith, that he was, when he so attended as aforesaid, informed by a person in the said dwelling-house of the said defendant, who represented himself [or herself] to be and whom this deponent verily believes then was the son [or wife, daughter, servant, &c. according to the fact] of the said defendant; that [here state what passed, which may be as follows:] the said defendant was not then at home in his said dwelling-house, and that he [or she] the said son [or wife, &c. as before] could not inform this deponent where he might then meet with the said defendant. And thereupon this deponent then informed the said son [or wife, &c. as before] that he had so called to serve the said defendant with a copy of a writ of summons at the suit of the said plaintiff, naming him, and that he this deponent would attend at the said dwelling-house for that purpose again on — next, [some day soon after the first call] at — of the clock in the fore [or after] noon, [if the fact be so add], at which time and place the said son [or wife, &c. as before] informed this deponent that he [or she] believed that the said defendant might be met with. And this deponent further saith, that he did accordingly attend at the said dwelling-house of the said defendant at — of the clock in the fore [or after] noon of the said —, and then saw the said son [or wife, &c. as before, or if another person, "a person in the said dwelling-house who represented herself [or himself] to be and whom this deponent verily believes then to have been the wife [or son, &c. as before] of the said defendant]; and that on the said last mentioned occasion the said son [or wife, &c. as before] informed this deponent that the said defendant was not then in his said dwelling-house, and that he [or she] could not tell this deponent where the said defendant might then be met with [according to the fact, stating the substance of the answers given to the deponent's inquiries]; whereupon this deponent informed the said son [or wife, &c.] that he this deponent would again attend at the said dwelling-house of the said defendant on — then next [some day soon after the second call] for the purpose of seeing the said defendant, and serving him with a copy of the said writ of summons. And this deponent further saith, that he did accordingly attend at the said dwelling-house of the said defendant on the said — then next for the purpose of seeing the said defendant, and was then informed by the said son [or wife, &c. or a person there who represented herself [or himself] to be and whom this deponent believes then to have been the servant [or wife, &c. as before] of the said defendant; that the said defendant was not then in his said dwelling-house, and he [or she] the said son [or wife, &c. as before] could not inform this deponent where he the said defendant might then be met with [according to the fact, stating the substance of

First call with a copy.

Second call.

Third call.

* This is a full form, but *seem* that the writ of summons might be described more generally, as in the form of affidavit of the service of a copy of a writ of summons, ante, 289; and when there is

doubt as to *regularity*, then it would be proper to annex and verify a copy, and avoid swearing to the *regularity ante*, 291, 2.

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A supplementary affidavit of attempt to serve a summons is admissible.

In case the Court should consider the affidavit insufficient, a *supplementary affidavit* may be made, and the application renewed.^(p) It seems that the Court require less particularity in an affidavit in order to obtain a *distringas* antecedent, and with a view of proceeding to *outlawry*, than in an affidavit to enable the plaintiff to enter an *appearance for the defendant*.^(q) But when a *distringas* has in the latter case been ordered, perhaps inadvertently, on an insufficient affidavit, the Court will not afterwards merely on that account set aside such writ of *distringas* against the goods.^(r)

3. Proceedings thereon.

After the expiration of eight days from the last *ineffectual*

Delivery and leaving a copy of writ.

Production and shewing of the original writ.

Request to deliver copy to defendant.

Inability to serve a copy personally.

Belief that defendant was at home, and why.

Defendant seen going in and out of his residence.

Indorsement of day of leaving writ.

Search for appearance.

what transpired.] Whereupon he this deponent delivered to and left with the said son [or wife, &c.] at and in the said dwelling-house of the said defendant a true copy of the said writ of summons, and of the memorandum and indorsements so subscribed and made thereon as aforesaid. And this deponent at the same time there shewed to the said son [or wife, &c. as before] the said original writ of summons with the said memorandum and indorsements thereon, and desired the said son [or wife, &c. as before] to give or forward the said copy to the said defendant as soon as possible, and which the said wife [or son, &c.] then promised this deponent to do on the same day, saying, &c. [state what if any thing was said]. And this deponent further saith, that notwithstanding the aforesaid and other attempts and endeavours for that purpose, he hath not been able to serve the said defendant personally with a copy of the said writ of summons; and he verily believes that the said defendant did at and after the several times aforesaid purposely keep out of the way to avoid being personally served with the said copy, and that at each and every of the said three mentioned times when this deponent did so attend as aforesaid, the said defendant was at home at and in his said residence and dwelling-house, and at his request was denied to this deponent on purpose to avoid personal service of the said writ of summons and the said copy thereof; and this deponent's grounds and reasons for so believing are, that he this deponent was informed by N. O. a neighbour of the said defendant, (and which information he this deponent verily believes to be true), that he well knew the person of the said defendant, and that he had seen the said defendant at a window of his said house and residence a short time on the said three days and times when this deponent attended and called at the said dwelling-house as aforesaid, as well just before as just after he so attended and called. And this deponent further saith, that he verily believes for the reasons aforesaid and others, that the said defendant cannot be compelled to appear in this action without some more efficacious process; and this deponent is informed and verily believes that the said defendant hath goods in his said dwelling-house which can and may be lawfully seized and taken and distrained under and by virtue of a writ of *distringas* of this Honourable Court, if a judge thereof will authorize the issuing thereof. And this deponent lastly saith, that he hath been informed by several persons and he verily believes that the said defendant hath been frequently seen in the neighbourhood of and going into and from his said dwelling-house between the said first and last attendance of this deponent there. And this deponent further saith, that he did on, &c. being within three days from and after he so left the said copy of the said writ as aforesaid at and in the said dwelling-house and residence of the said defendant, indorse on the said writ of summons the said day of the week and month and the year of the said service thereof.* And that he did on, &c. [as recently as possible before making the affidavit] duly search in the proper office for an appearance by the said defendant in this action, but that the said defendant had not at that time appeared therein or thereto.

G. H.

Sworn, &c. [not before plaintiff's attorney or his clerk.]

N.B.—When the summons has been attempted to be served in the country, a separate affidavit of the search and no appearance having been entered, must in general be made.

(p) *Giles v. Burroughs*, Price's Notes, Crom. & M. 720; *Jones v. Price*, 2 Points Prac. 77; Price's Gen. Prac. 46. Dowl. 42.

(q) *Hewitt v. Mellon*, 3 Tyr. 822; (r) *Smith v. Macdonald*, 1 Dowl. 688.

* As to indorsing the year, see Price's Gen. Pr. 73; and ante, 243.

application at the defendant's residence, inclusive of the day when such attempt was made,(s) search should, as before directed, be made at the proper office for an entry of the defendant's appearance not only in the *appearance book* there, but inquiry should be made whether a memorandum of the appearance has not been *left* in the office, but inadvertently not as yet entered by the clerk, as sometimes has occurred, and when in consequence of no such further inquiry, the defendant's appearance has been overlooked, and the plaintiff's attorney has irregularly entered an appearance for the defendant. If on search no appearance has been entered by the defendant, the before-mentioned *affidavit* may then be made.

In term, this affidavit, with a brief thereof, and reference to applicable decisions, in case of any peculiarity in the attempted service, is then to be delivered to counsel, indorsed with instructions thus, "*To move for a distringas to compel the defendant's appearance;*" and the Court require the plaintiff's counsel to declare(t) *his election* either to move for a distringas for *that* purpose, or in order to proceed to outlawry, and the Court will not grant a rule in the alternative;(u) and it should seem that in such case the *notice at the foot of the distringas* should state the *intention to proceed to outlawry*, instead of an intention to enter an appearance for the defendant, and cannot be framed in the alternative;(x) and it has been suggested that, in proper cases for outlawry, it may be advisable that even the *affidavit* should state the intention so to proceed.(y) If the Court consider the affidavit satisfactory, and sufficient to authorize them to issue a distringas, so as to empower the plaintiff to enter an appearance for the defendant, then they grant a rule, which is absolute in the first instance.(z) In *vacation*, the practice is to lay

Motion for writ.

Rule for writ.

(s) *Brian v. Stretton*, 1 Crom. & M. 74; 3 Tyr. 163; 1 Dowl. 642, S. C.; 1 Arch. K. B. 4th edit. 530. *Eight days* at least must elapse from the day when the person last called with and left a copy of the writ of summons, before a distringas can be applied for, *id. ibid.*; and see *Thomas v. Elder*, 1 Tyr. 496, decided upon the ancient writ of *venire*.

(t) *Fraser v. Case*, 9 Bing. 464; Price's Gen. Prac. 58.

(u) *Fraser v. Case*, 9 Bing. 464; 2

Moore & Scott, 720, S. C.; 1 Dowl. 725. Indeed the affidavit to compel an appearance materially differs from that to proceed to outlawry, Price's Gen. Prac. 58; and Atherton on Personal Actions, 61, 62, 139, 140.

(x) Atherton on Personal Actions, 140, cites *Fraser v. Case*, 9 Bing. 464, as deciding that the notice at the foot of the distringas must not be in the alternative.

(y) Atherton on Personal Actions, 61, 62, 139, 140; see Chap. XI. *post*.

(z) In the King's Bench, [or Common Pleas, or Exchequer of Pleas.]

Rule for a distringas.

—, the — day of —, in — Term, in the — year of the reign of King William the Fourth.

B. } Upon reading the affidavit of G. H., it is ordered that a writ of distringas
against } do issue, directed to the sheriff of —, to compel an appearance by or on
D. } the behalf of the defendant, pursuant to the act of parliament in that case made and provided.

On the motion of Mr. —.

By the Court.

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the affidavit before a judge at his chambers, and if he be satisfied, he will then make his *order*.

4. *Præcipe* for
distringas.

4. *Præcipe for writ*.—It has been stated that where such rule or order has been obtained, a *præcipe* for the writ of distringas should be prepared for and left at the proper office in which such writ is to be signed, (a) and the form of such *præcipe* has been given. (b) But in another work it is said that such *præcipe* is not necessary, even in the Exchequer, although we have seen that in that Court, a *præcipe* is in general required for most writs, and the reason assigned is, that the distringas is issued by a *rule or order*, which must be delivered to the officer of the Court, and supplies the use of any *præcipe*. (c) However, the safest course is in all cases to make out a proper *præcipe*, containing the substance of the writ to be issued under the authority of the rule or order.

5. The form
and requisites
of the writ of
distringas, and
notice at foot,
and indorse-
ments there-
on. (d)

5. *The form and requisites of the writ of distringas, and notice at the foot*, are prescribed by 2 W. 4, c. 39, s. 3; and by schedule No. 3, (d) the 12th section of that statute, as regards the *teste* in the name of the chief justice, and the *indorsement* of the name and place of abode of the *plaintiff's attorney*, or of the *plaintiff's residence*, when he sues in person, extends to *all writs*, and consequently includes a *distringas*. (e) The General Rule of Mich. T. 3 W. 4, r. 8, expressly provides, that in every writ of distringas issued under the authority of that act, a *non omittas* clause may be introduced by the plaintiff without the payment of any additional fee on that account.

We have seen that the writ must be *tested* of the day when it is *issued*, whether in term or vacation, but must be *returnable*

Judge's order
for rule for a
distringas in
vacation.

B. } Upon reading the affidavit of G. H., and upon hearing the attornies or
agents on both sides, I do order that the secondaries [or ———] do
D. } draw up a rule that a writ of distringas do issue, directed to the sheriff of
——, to *compel an appearance* by or on behalf of the defendant, pursuant to the act of
parliament in that case made and provided.

Dated the ——— day of ———, 1835.

Judge's signature.

(a) 1 Chitty's Arch. 4th edit. 531.

(b) T. Chitty's Forms, 544, as thus:—

County of ———. Writ of distringas for A. B. against C. D., returnable on ———, in an action on promises [or as the form of action is to be, and of course the same as in the summons.]

Y. Z.

Attorney. ——— of ———, A.D. 1835.

(c) Price's Gen. Prac. 58.

(e) *Ante*, 208; and Wordsworth's

(d) See forms, *ante*, 154, in note.

Rules, 76, note (a).

in term, (f) and have at least *fifteen days* between the teste and return day, exclusive of the former; (g) and if made returnable on one of the now very few dies non, it would be void. (h) It must be properly *directed* to the sheriff of the county in which is situate the defendant's principal residence, and where he may have distrainable goods; but it may be directed to the sheriff of any other county, when so authorized by the Court or a judge; as where it has been sworn that the defendant has distrainable property in such other county. (i) The *form of action* must be accurately described, and be the same as in the previous writ of summons. (k)

It must be kept in view, that before issuing a writ of distringas it must be determined for what object it shall be issued, i. e. whether with intent to enable the plaintiff to enter an appearance for the defendant, or to outlaw the defendant, and on applying to the Court or a judge, the option must be declared; and although the conclusion of the notice to be subscribed at the foot of the distringas, as prescribed by the statute, is in the *alternative*, yet the writ when issued must not be in the alternative, but confined in *the present case* to a notification that the plaintiff "will cause an appearance for the defendant, and proceed thereon to judgment and execution;" (l) when if it is intended to outlaw the defendant, notice at the foot of the distringas, in lieu of those words, concludes thus, "will cause proceedings to be taken to outlaw you." (m)

If there should be any *material omission* or variance in the writ or copy served, the same would constitute an *irregularity* to be objected to in due time, viz. within eight days, the same as in case of a defective writ of summons or copy; and we have seen that no amendment could be allowed unless in cases where the statute of limitations would otherwise bar the remedy. (n) The writ is to be *signed* and *sealed* by the same officers, and at the same offices, and in like manner as a writ of summons and other writs, with this exception, that the rule or order for the writ is to be produced to and *left* with the signer of the writs. The writ and notice is to be in the form prescribed in the sche-

(f) It has been objected that the requiring this writ to be *returnable in term* occasions unnecessary delay, Price's Gen. Prac. 38, in notes; 92, 93. But probably that requisition was imposed in order that the defendant might have an opportunity of applying for relief to the Court in Banc.

(g) *Ante*, 150.

(h) *Kenworthy v. Peppiat*, 4 Bar. &

Ald. 288.

(i) 2 W. 4, c. 39, s. 3.

(k) See description of forms of action, *ante*, 194 to 199.

(l) *Ante*, 154, in notes; and *Fraser v. Case*, 9 Bing. 464; *Atterton on Personal Actions*, 140.

(m) *Id. ibid.*

(n) *Ante*, 231 to 236

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dule of 2 W. 4, c. 39, and as stated in a preceding page; (o) and the 12th section of the act requires the *indorsement* of the name and place of abode of the plaintiff's attorney, and if there be also an agent in certain cases, or if the plaintiff sue in person then with a more precise statement of his name and place of abode, (p) and if the action be for a *debt*, the amount of the plaintiff's claim for debt and costs must also be indorsed, in pursuance of the 5th rule of Mich. T. 3 W. 4. (q) It will be observed that this writ does not in terms, as might have been desirable, direct the sheriff to serve the defendant personally with a copy of the writ if he be found in his bailiwick, or even direct the sheriff to leave a copy of the writ at the place where the distress may be taken, but those directions are only found in the third section of the statute. (r) It should seem, however, that if a copy of the writ be actually served personally, or if a distress be made, the plaintiff might in default of appearance enter an appearance for the defendant even without leave. (s)

Writs of distringas into counties palatine.

The forms of writs of distringas, with the notice at the foot, to be issued into the counties palatine of Lancaster and Durham, are prescribed by the General Rule Mich. T. 3 W. 4, Reg. II., and differ only in the *commencement* from the other usual writ of distringas in other counties. The forms there given are silent as to any indorsement. But the enactment in 2 W. 4, c. 39, s. 12, requiring the indorsement of the name and place of abode of the attorney and agent, &c. of the plaintiff, or the indorsement of the particulars of his own residence when he sues in person, clearly extends to all writs issued by the authority of that act, and certainly so to writs of distringas and *capias* into a county palatine. The rule Mich. T. 3 W. 4, referring to that of Hil. T. 2 W. 4, and requiring in actions for a *debt* an indorsement of the amount of the claim for debt and costs, also extends to a writ into a county palatine.

6. *Proceedings on writ of distringas and how to be executed.* (t)

6. *Proceedings on Writ of Distringas.*—The 3d section of 2 W. 4, c. 39, thus expressly enacts, “ which writ of distringas “ and notice, or a copy thereof, shall be *served* on such defendant, *if he can be met with*, or if not, shall be *left* at the “ place where such distringas shall be *executed* (i. e. where “ the goods of the defendant shall be distrained.”) Hence it

(o) *Ante*, 154, in note.

(p) *Ante*, 152, in note; and *ante*, 203.

(q) *Ante*, 160; and *ante*, 212.

(r) *Ante*, 150, in note.

(s) *Johnson v. Smealey*, 1 Dowl. 526, 555, *post*, 315; and Atherton on Personal Actions, 58, Appendix, xlii.

(t) Tidd's Supp. 1833, p. 85.

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is clear that bona fide attempts to *serve* this writ on the defendant and to distrain his goods, should be made, and it would be irregular to instruct the sheriff not to make such attempts or to return such writ non est inventus or nulla bona, at least without leave of a judge. (u) The proper practice is upon obtaining the writ of distringas to make at least one copy, to indorse the name of the plaintiff's attorney and agent as before advised, (v) and in actions for a *debt* to make the proper indorsement of the plaintiff's claim for debt and costs on the copy, in order that (x) the same may be delivered with the writ to the sheriff, and whose officer is to endeavour to deliver the copy to the defendant in person, or otherwise to leave the same at his said supposed residence, where also his goods are distrained. The writ itself and copy are to be taken to the proper sheriff's office, and a warrant thereon obtained, directed in general to the sheriff's officer, whom the plaintiff's attorney desires to employ. The fee to be paid is 1s. for every warrant in Middlesex, London, Surrey, Sussex and Kent, but 2s. 6d. in every other county; or an officer will obtain the warrant for the plaintiff's attorney. The form of the warrant is as in the note. (y)

The officer is thereupon to endeavour to *serve* the copy on the defendant *personally*, (z) and if he cannot, he is then to *leave* the copy at the defendant's residence, and he is also to *distrain* (that is *seize*) goods of the defendant of the value of forty shillings or thereabouts, if he can by due inquiry find any within his bailiwick, as a mode of inducing the defendant

(u) See *post*, Chap. XI. as to leave of a judge in proceedings to outlawry that the sheriff may speedily return non est inventus.

(v) *Ante*, §09.

(x) *Ante*, 212.

(y) To L. M. and N. O., my bailiffs.

"Essex to wit. Distrain C. D., by his goods and chattels for the sum of forty shillings in my bailiwick, so that he appear in the Court of ———, at Westminster, on ——— the ——— day of ———, A. D. ———, to answer A. B. of a plea of trespass on the case [or as the form of action may be] [and serve the said C. D. personally with a copy of the writ of distringas and notice and indorsements, if he be found in my bailiwick, and if not, leave such copy at the residence or place, where you shall or may so distrain the goods of the said C. D.*] Dated this ——— day of ———, 1835."

Sheriff's warrant to his officer on a distringas.

Y. Z., Esquire, Sheriff.

E. F. of ———, attorney for said A. B.
Levy forty shillings.

(z) 2 W. 4, c. 39, s. 3, *ante*, 150, in note.

* I have considered it advisable to add to the usual form these words within the brackets.

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to appear. (a) The service of or leaving the writ, and the distress, may be made on any day, not being a *dies non*, on or before the return day, and at any hour of the day or night, but within the proper boundary of the county, with the exception of a county within another county. (b) An outer door must not be broken to make the distress, although if peaceable entry has been obtained at the outer door, then an inner door may be broken. If all the goods of the defendant to be found be not equal to the value of 40s., then the taking them is a sufficient distress according to the act. (c)

7. The defendant or his attorney entering his appearance to a writ of *distringas*.

7. *Defendant's appearance*.—Whenever the defendant has been personally served with a copy of the writ of *distringas*, or his goods have been distrained, and a copy of that writ, with the subscribed notice, has been left at the place where such distress was made, in pursuance of the 3d section of 2 W. 4, c. 39, then it is incumbent on the defendant, under that act, and in obedience to the notice in the schedule No. 3, (d) to cause his appearance to be entered in the proper office of the Court, and in the same form as prescribed in the 2d section of the act, (e) *within eight days after the return day* named in the writ of *distringas*, *inclusive* of such return day, and which, we have seen, must be in one of the four terms, and sometimes occasioning a delay in a plaintiff's proceedings, contrary to the declared general object of the uniformity of process act, 2 W. 4, c. 39. (f)

8. Proceedings in case of an actual levy and personal service of a writ of *distringas*, or either of them, in case the defendant himself does not enter his appearance.

8. *Proceedings on Sheriff's Return, &c.*—It will be observed that the 2 W. 4, c. 39, s. 3, is silent as to the proceedings to be taken in case the defendant has been *actually served* in person with a copy of the writ of *distringas*, and his goods *shall have been actually seized*, or in case either of those proceedings has taken place, and only provides how the Court or a judge may interfere when the sheriff has returned in the *conjunctive* “non est inventus and nulla bona.” But although the statute is thus silent, it has been decided that if the sheriff has *actually distrained* on the defendant's goods, and left on the same premises a copy of the writ of *distringas* with the notice at

(a) Tidd's Supp. 1833, p. 85; see a form of affidavit that officer did not distrain, because plaintiff did not inform him of any goods, Atherton on Personal Actions, Appendix, xlii.

(b) 2 W. 4, c. 39, s. 20, *ante*, 153. In a case where there is a county surrounding another county, a special direction may be introduced in a *distringas*,

the same as in a *capias*, *post*, 342, note (3), and which seems authorized, if not required, by the concluding words of section 20.

(c) *Jones v. Dyer*, 2 Dowl. 445.

(d) *Ante*, 150 and 154, in notes.

(e) *Ante*, 154, in notes, and see forms, *ante*, 283, 4.

(f) Price's Gen. Prac. 92, 93.

the foot, for the defendant, and do not appear, then the plaintiff, upon the sheriff's return of that fact, and upon an affidavit of the fact, and that the *defendant himself* has not caused an appearance to be entered, may as of course enter an appearance for the defendant, according to the statute, *without any application for or leave of the Court or a judge.* (g) This proceeding is impliedly authorized by the terms of the notice at the foot of the distringas in the schedule No. 3, and by the 16th section of the act. (h) It would seem also that if the defendant were *personally served* with a copy of the writ, although no distress has been made, an appearance might also be entered for him by the plaintiff. (i) But it is clear that if there has neither been a distress nor personal service, then the plaintiff cannot either enter an appearance or proceed to outlawry *without express leave of the Court or a judge*, upon an application for that purpose, founded upon an affidavit, shewing the endeavours to distrain and to serve the defendant as presently stated.

9. *Of plaintiff's entering appearance without leave.*—It follows a fortiori that if the sheriff's officer has *actually served* on the defendant a copy of the writ of distringas, *and also executed* the writ by *distraining* his goods to the value of forty shillings, or even of less value, if all that can be found, (k) then after searching, on or after the ninth day inclusive of the return day of the distringas, (which we have seen must be on a day certain in term,) at the proper office, to ascertain whether the defendant has entered his appearance, and ascertaining that he has not, the sheriff's return to the writ of distringas must be obtained, stating, when the facts will authorize, that he has distrained and served the writ on the defendant, as in the subscribed form, (l) or at least stating *one* of those facts, and

9. Proceedings when the sheriff has served and also executed a writ of distringas and of a plaintiff entering an appearance for the defendant thereupon, without leave of the Court or a judge.

(g) *Johnson v. Smealey*, 1 Dowl. 526, 555; and see Wordsworth's Rules, 77 a; see forms of affidavit, *id.* 125, 126; and see Atherton on Personal Actions, 58, and *id.* Appendix, xli. and xlii.

(h) *Per Parke, J., id. ibid.*

(i) *Semble*, and see Atherton on Personal Actions, 58; and see forms of affidavits, where the defendant has been *personally served*, but no distress made, *id.* Appendix, No. 5, p. xlii.

(k) *Ante*, 314, note (c).

(l) The within named C. D. is distrained by R. S. and T. U., by distraining upon his goods of the value of 40s.; and I further certify and return that at the time of the execution (i. e. distress) of this writ, I caused a true copy of the said writ and of the written notice at the foot thereof, and of the indorsements thereon, to be personally served on the said C. D., apprizing him of the cause of the said distress, and that in default of his appearing to this writ, within eight days inclusive after the return thereof, being the ——— day of ———, the within named A. B. would cause an appearance to be entered for him, and proceed thereon to judgment and execution."

The answer of Y. Z., Sheriff.

Return that he has executed a writ of distringas by seizing goods and serving copy on defendant in person.

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having obtained such return from the sheriff, the sheriff's officer is thereupon to make an *affidavit* of such service and execution of the writ of distringas in the subscribed* form, (m) and then such affidavit is to be *filed* with the proper officer, (in the King's Bench the clerk of the common bail,) and at the same time the plaintiff's attorney may enter an appearance *for the defendant even without the leave of or application* to the Court or judge; (n) when if there has been a distress, but no *personal* service of a copy of the writ, and a copy has been merely left at the place of distress, then the affidavit will be in the next form. (o) But when a copy of the writ has been *personally* served, but there has not been any actual distress, then the form of affidavit would be as subscribed in the next page.

Affidavit that the defendant's goods have been taken under a distringas, and himself been personally served with a copy of the writ of distringas.

(m) In the King's Bench [or Common Pleas, or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

E. F. of _____, officer to the sheriff of the county of _____, maketh oath and saith, that he this deponent did on the _____ day of _____ instant [or last] by virtue of a warrant granted to this deponent by the sheriff of the said county, upon a writ of distringas, which appeared to this deponent to have been *regularly* [if that be doubtful omit that word] issued out of and under the seal of this Honourable Court, against the said defendant at the suit of the said plaintiff, directed to the sheriff of the county of _____, bearing teste the _____ day of _____ last, and returnable on _____ the _____ day of _____ last [or instant or next] execute the said writ of distringas, by distraining upon the goods and chattels of the said defendant in his dwelling-house, situate at _____ in the said county, for the sum of forty shillings, in order to compel his appearance in the said Court of _____, to answer the said plaintiff in a plea of trespass on the case [or "on promises" or "debt" as the case may be*]; and this deponent further saith, that he did at the time of the said execution of the said writ of distringas *personally serve* the said defendant with a true copy of the said writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, by delivering such copy to the said defendant in person.

E. F.

Sworn, &c.

(n) *Johnson v. Smealey*, 1 Dowl. 526; Price's Gen. P. 42; Arch. C. P. [27.]

Affidavit of a distress upon the goods, and having left a copy of writ at defendant's residence.

(o) [The same as in the last form to the asterisk*, and then as follows.] And this deponent further saith, that at the said time and place of his so executing the said writ of distringas, he inquired and sought for the said defendant, but was informed by a person there, who represented himself [or herself] to be, and whom this deponent verily believes to have been the son [or wife, &c. *according to the fact*] of the said defendant, that he the said defendant was not then at his said dwelling-house [or *other place as the case be*] whereupon he this deponent delivered to and left with the said son [or wife, &c. *as before*] at the said place of execution of the said writ of distringas a true copy of the said writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, and this deponent then and there informed the said son [or wife, &c.] of the said defendant of the true intent and meaning of such distringas and notice and levy as aforesaid, and requested him [or her] immediately to deliver or forward the same to the said defendant, and which the said son [or wife, &c.] then promised to do.

Sworn, &c.

Signed,

10. *Cases where leave of the Court or a judge is essential.*— If the writ of distringas can *neither be served on the defendant, nor his goods taken as a distress*, then the sheriff's correct return in the conjunctive of non est inventus *and* nulla bona, or rather "*nihil*," must be obtained, and which may be in the subscribed form; (p) after which the Court in term must be moved, or a judge in *vacation* applied to on a summons and *proper affidavit*, the form of which is subscribed, (q)

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10. Proceedings on sheriff's return of non est inventus and nulla bona, and to obtain leave of Court or judge to enter an appearance for the defendant sec. stat.

In the King's Bench.

Between, &c. [as before.] *

O. P. of ——— in the county of ——— officer to the sheriff of the said county, maketh oath and saith, that he this deponent did on the ——— day of ——— instant, personally serve the above named defendant with a true copy of the writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, which writ of distringas was directed to the said sheriff, and returnable on ———, and appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court, against the said defendant, at the suit of the said plaintiff, on the ——— day of ——— [teste day of the writ]; and this deponent further saith, that previously to the said service of the said true copy of the said writ of distringas as aforesaid, the said sheriff had granted to this deponent, and this deponent held at the time of such service a warrant upon the said writ of distringas, authorizing and requiring this deponent, as such officer as aforesaid, to distrain upon the goods and chattels of the said defendant for the sum of forty shillings, in order to compel an appearance in the said Court to answer the said plaintiff in a plea of debt [or as the case may be]; but that neither the said plaintiff before, nor the said defendant at the time of the said service, informed this deponent, nor did he this deponent know where any goods or chattels of the said defendant might be found or distrained upon within the said county, although he this deponent at the time of the said service requested the said defendant to point out to this deponent where he might meet with any such goods or chattels, and he this deponent was unable to execute the said warrant, by making any distress upon the goods or chattels of the said defendant.

The like, of affidavit of personal service of writ of distringas, but no distress taken, because no goods on request had been pointed out.

Signed,

Sworn, &c.

(p) "The within named C. D. hath nothing in my bailiwick by which he can be distrained, nor is he found in the same."

The answer of Y. Z. sheriff.

Form of sheriff's return of nulla bona and non est inventus.

(q) In the King's Bench [or Common Pleas, &c.]

Between { A. B. plaintiff,
and
C. D. defendant.

G. H. of, &c. maketh oath and saith, that a writ of distringas having been issued against the above named defendant on the 26th January last, in pursuance of a rule of this Honourable Court [or the order of Mr. Justice ———] directed to the sheriff of ——— a warrant was granted thereupon by the sheriff of the said county to this deponent, who in pursuance thereof attended three several times on several days before the return day of the said writ at the dwelling-house [or lodgings] of the said defendant, situate at, &c. for the purpose of executing the said writ and warrant, he this deponent on each occasion having the said writ and a true copy thereof in his possession ready to shew the former, and deliver the latter to the said defendant; and that the said defendant was on each of those occasions denied to this deponent, although this deponent is informed and verily believes that he was then at home at his said dwelling-house [or lodgings]. And this deponent further saith, that on the 13th April, the return day of the said writ of distringas, he finding it impossible to execute the said writ or warrant, delivered unto and left with L. M. who keeps and this deponent verily believes is the occupier and housekeeper of the house in which the said defendant's lodgings and residence are so situate as aforesaid, and who is his landlord, a copy of the said writ of distringas and notice thereto subscribed and annexed, requiring the said defendant's appearance within eight days inclusive after the return day of the said writ. And

Affidavit of ineffectual attempts to serve and execute a writ of distringas.

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stating in substance that *all due means* (viz. at least *three ineffectual attempts*) to serve the *distringas* have been taken (shewing the particulars of such attempts,) and that the defendant has no goods at his residence, nor, as it is believed, after diligent inquiries, elsewhere, (q) for leave to enter an appearance for the defendant; (r) and thereupon the Court or a judge will in general make a rule (s) or order (t) allowing the

this deponent further saith, that he was unable to distrain for the sum of 40s. according to the tenor of the said writ, because the lodgings of the defendant then were and still are ready-furnished, and the said L. M., who keeps and has the principal possession of the said house, having informed this deponent that the said defendant had nothing there on which this deponent could legally distrain, and which information this deponent verily believes to be true. And this deponent hath made all possible inquiries as well of the said L. M. as elsewhere whether the said defendant hath any goods or chattels or property elsewhere which could or might be taken or distrained under the said writ of *distringas*, but this deponent hath not been nor is he able to ascertain whether the said defendant hath any such goods, and this deponent verily believes he hath none. And this deponent further saith, that he verily believes that the said copy of the said writ of *distringas* so left as aforesaid hath reached and come to the full notice and knowledge of the said defendant, the said L. M. having stated to this deponent that all papers left for the defendant had been and would continue to be forwarded to him, and which information this deponent verily believes to be true, but declined to say where he was; and this deponent verily believes that the said defendant hath been and is well aware of the said proceedings in this cause, and that he hath kept out of the way purposely to avoid them or the service or execution thereof. And this deponent further saith, that the said Sheriff of Middlesex having been ruled to return the said writ of *distringas*, hath duly returned the same that the said defendant is not found within his bailiwick, and that he hath not any goods within the said sheriff's bailiwick by which he could be distrained. And this deponent further saith, that he did search the appearance-book in the *Exchequer Office* on the 29th April last, and that the said defendant had not caused to be entered any appearance to the said writ of *distringas*. And this deponent further saith, that since the issuing of the said writ of *distringas* an offer has been made to the said plaintiff to pay him 5s. in the pound in full of his debt in question, and which offer this deponent is informed and verily believes hath been and was made by the authority and at the request of the said defendant. And this deponent further saith, that a clerk to an attorney, who this deponent also verily believes acted by and with the authority of the said defendant, hath obtained copies of the writ of summons and *distringas* in this cause from the plaintiff's attorney, but refused to sign any undertaking to appear or to state whether or not he was authorized by the said defendant. And this deponent further saith, that all proper means have been used to serve and execute the said writ of *distringas* and warrant thereon.

Sworn, &c.

G. H.

N.B.—Parts of this affidavit are suggested by the case of *Cornish v. King*, 3 Tyr. 575. I have ventured to suggest some additions.

- (q) *Cornish v. King*, 2 Dowl. 18; *Scarborough v. Evans*, 2 Dowl. 9.
(r) *Tring v. Godding*, 2 Dowl. 162.

- (s) See 2 W. 4, c. 39, s. 3; *Scarborough v. Evans*, 2 Dowl. 9, *Cornish v. King*, *id.* 18; 3 Tyr. Rep. 575, S. C.; *Bulgay v. Gardner*, 2 Dowl. 52.

In the King's Bench [or Common Pleas, or Exchequer of Pleas].

A. B. } Upon reading the affidavit of E. F. and G. H. it is ordered, that the plain-
v. } tiff be at liberty to enter an appearance for the defendant in this action ac-
C. D. } cording to the statute in that case made and provided, and to proceed thereon
to judgment and execution.* Upon the motion of Mr. —.

By the Court.

- (t) B. } Upon reading the affidavit of E. F. and G. H. I do order that [&c.
v. } proceed as in the preceding form to the *, and then conclude thus:] Dated
D. } the — day of — A.D. 1835.

[Judge's or baron's signature.]

Rule of Court authorizing plaintiff to enter an appearance for the defendant upon a *distringas* returned nulla bona and non est inventus.

Judge's order to the like effect.

plaintiff "to enter an appearance for the defendant, and to proceed to judgment and execution."^(u) And although the sheriff has *returned non est inventus* and *nulla bona*, yet an *affidavit* stating the particular endeavour to execute the *distringas* cannot be dispensed with, although it be sworn that the officer has since died, for the Court cannot act upon hearsay evidence of the mode of service.^(x)

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The rule or order for the plaintiff's entering the appearance is thereupon to be taken to the proper office for *entering appearances*, with a memorandum on parchment, filled up as in the ordinary case of an appearance entered by the plaintiff for the defendant,^(y) and there left; after which the plaintiff may proceed in the action by declaring absolutely the same as if the defendant himself had duly appeared, and on a separate motion a rule may be obtained that leaving a notice of declaration at the lodging or last place of abode may be deemed good service.^(z) If any of the defendant's goods have been taken under the *distringas*, they are not to be sold, but to be taken care of, and returned to the defendant after such appearance, on reasonable request.^(a) It will be observed that the legislature and the Courts have thus interposed great checks upon a plaintiff, and enforced the utmost protection to defendants, requiring in effect at least six *bonâ fide* endeavours to serve the defendant with process, or an actual distress of his goods after three previous attempts to serve him personally, before a plaintiff can enter an appearance for a defendant, and proceed to judgment and execution.

Plaintiff's entering appearance thereupon.

Where a *distringas* has been returned *non est inventus* and *nulla bona*, and the defendant's residence was a *furnished lodging*, an affidavit of the attempts to execute the warrant issued on the *distringas* should be made, and that the copy of the *distringas* and warrant issued thereon was left at the lodgings, and that *diligent inquiries have been made whether the defendant had goods there or elsewhere*, and that none can be discovered, and the plaintiff may thereupon be suffered to enter an appearance for the defendant, and proceed to judgment and

Proceedings where a defendant resided in furnished lodgings.

(u) Price's Gen. Pr. 42; *Johnson v. Smealey*, 1 Dowl. 526; and *Tidd's Suppl.* 1833, p. 86.

(z) *Ante*, Chap. V. 245; *Daniels v. Varity*, 3 Dowl. 26; 9 *Legal Observer*, 221, S.C.

(y) *Ante*, 294.

(z) *Cornish v. King*, 3 Tyr. 576; and see *Rule H. T.* 1832, r. 49.

(a) *Smith v. Macdonald*, 1 Dowl. 688; *sed quare*, see case 1 *Chitty's Arch.* 535, 4th ed.

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execution under 2 W. 4, c. 39, s. 3. (b) But it cannot be made part of the above rule that service of notice of declaration at the defendant's last known place of residence, and sticking up a declaration in the office, shall be deemed good service, (b) for there must be a distinct rule for that purpose. (b)

Second case,
Where defendant has a known residence in England, and goods, but is out of the kingdom. (c)

In the *second* case before alluded to, that of the defendant having a known residence in England, but being known or supposed to be out of the kingdom, if it be sworn that the defendant has gone or stays abroad *to avoid his creditors*, and has left servants at his house, (d) the Court, in one case, allowed the plaintiff to issue a distringas, the affidavit having the usual requisites, and the service of a previous summons having been effected by leaving the copy thereof at the defendant's residence on the third call. (e)

Third case,
Where defendant has no known residence, but is supposed to be in England. (h)

In the *third* case before noticed, i. e. when the residence of the defendant in England is unknown, still endeavours must be made to serve him personally with a writ of summons, before a distringas can be obtained, (f) and facts must be sworn to, to induce the Court to believe that the defendant is in England, but keeps out of the way to avoid the service of process. (f) It has been observed, (g) that *when the defendant is abroad*, a distringas may be obtained on a proper affidavit, either to compel his appearance, (h) or for the purpose of proceeding to outlawry; (i) but where the defendant is not abroad, a distringas for the purpose of outlawry will not it seems be granted, (i) and where there is reason to believe that he is abroad, a distringas to compel an appearance, it is said, will not be allowed. (j) One state of circumstances or the other must be made out; (i) and where it was not clear on the face of the affidavit whether the defendant was in this country or abroad, the Court put the plaintiff to make his election as to the purpose for which he

(b) *Cornish v. King*, 3 Tyr. Rep. 575; and see *Tring v. Gooding*, 2 Dowl. 162. See the forms of affidavit given in 3 Tyr. 575, except the necessary allegations that due inquiries after goods of the defendant had been made; and see form, *ante*, 317, note (y), 318.

(c) See enumeration of the four cases, *ante*, 301.

(d) And *semble* also goods that might be taken under a distringas.

(e) *Moone v. Thynne*, 3 Dowl. 153; and see *Hornby v. Bowling*, 11 Moore, 369; *Fraser v. Case*, 9 Bing. 464, *ante*, 300, note (g).

(f) *Anonymous*, 1 Dowl. 555; Tidd, Supp. 1833, page 80; and see *Moone v. Thynne*, 3 Dowl. 153.

(g) Tidd's Supplement, 1833, p. 80; and see 9 Legal Obs. 8.

(h) i. e. *semble* an affidavit that he has goods to be taken under a distringas, *Moone v. Thynne*, 3 Dowl. 153.

(i) *Fraser v. Case*, 9 Bing. 464; 2 Moore & S. 720; 1 Dowl. 725, S. C.; Tidd, Supp. 1833, p. 80; *semble*, Wordsworth's Rules, 76, in notes; but *semble*, a distringas with that object would not be refused, if it be shewn defendant has goods; *Moone v. Thynne*, 3 Dowl. 153.

sought to obtain a *distringas*. (k) The *affidavit* must also state, when the defendant is abroad, not only that he went thither for the purpose of avoiding the demands of his creditors, but also satisfy the Court or a judge by a statement of the circumstances that he keeps out of the way to avoid being served. (l) In a very recent case, where an affidavit to ground a motion to enter an appearance stated that the defendant was a clerk in the *Victualling Office*, and that the plaintiff was not able to discover the defendant's residence, and that due diligence had been used to execute the *distringas*, but did not state that any inquiries had been made at the *Admiralty*; the Court held that due and proper means to serve the *distringas* did not sufficiently appear to have been used, and refused leave for plaintiff to enter an appearance for the defendant. (m)

In a *fourth* case, when the defendant has no known residence or place of abode, or of business, nor goods to be distrained upon, and it can be sworn that he is abroad *with intent to delay* his creditors, then (but not otherwise) (o) a writ of summons may be issued, and an affidavit of the diligent endeavours to execute it, and of the other facts, and an application made to the Court or a judge for a rule or order that a *distringas* shall issue, in order that after a due return of *nulla bona* and *non est inventus* proceedings to *outlawry* may be issued. (o) The affidavit, in that case, is differently framed to that when the plaintiff is at liberty to proceed so as to be enabled to *enter an appearance* for the defendant, and the counsel for the plaintiff should be differently instructed. (o) We will presently consider the proceedings to *outlawry* as well on serviceable asailable process. (p)

Fourth, Proceedings in nonailable cases to outlaw the defendant, or one of several defendants, where he has no known residence nor goods, but is out of the kingdom. (n)

When the plaintiff proceeds by *distringas*, he cannot in any case, *declare* before the defendant *himself*, or the *plaintiff* for *him*, *has entered an appearance*, and since the uniformity of process act, 2 W. 4, c. 39, a declaration cannot be delivered *de bene esse* or *conditionally* nor *absolutely* before *actual* appear-

Declaring after a distringas must be absolutely, and not de bene esse.

(k) See last note.

(l) Tidd's Supp. 1833, p. 80, and cites *Simpson v. Lord Graves*, 6 Legal Observer, 45.

(m) *Sanderson v. Bowen*, 2 Crom. & M. 515.

(n) See enumeration of the four cases ante, 301.

(o) 2 W. 4, c. 39, s. 35; *Frazer v.*

Case, 9 Bing. 464; 2 Moore & S. 720; *Simpson v. Lord Greaves*, 2 Dowl. 10; and *Morgan v. Williams*, Price, G. P. 53, note *, where Bayley, B. said, "If, when the writ of summons was left, the defendant was out of the kingdom, it is then a case for *outlawry*; and see 1 Price, G. P. 51, 52; and see *id.* p. 38.

(p) See *post*, Chap. XI.

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ance, (q) that mode of declaring being now confined to *bailable* cases where the proceeding has been by *capias*. The *commencement* of a declaration, where the appearance has been upon a *distringas*, is the same as where the appearance has been to a writ of summons, (r) and all the other proceedings are the same without any distinction as regards the previous writ.

(q) *Fish v. Palmer*, 2 Dowl. 460, *ante*, 296, as to declaring on a writ of summons, and the same reason against declaring *de bene esse* equally here applies; and see

Atherton's Personal Actions, 96 to 101.

(r) See form Reg. Gen. Mich. T. 3 W. 4.

CHAPTER VIII.

OF THE WRIT OF CAPIAS—CONSIDERATION OF ARRESTS—PRIVILEGES THEREFROM—RESTRAINTS UPON THE SAME—AFFIDAVIT TO HOLD TO BAIL, AND JUDGE'S ORDERS PERMITTING AN ARREST—PRÆCIPLE FOR WRIT OF CAPIAS—WRIT OF CAPIAS ITSELF—SHERIFF'S WARRANT—ARREST, AND PROCEEDINGS THEREON TO PERFECTING BAIL ABOVE, AND CONSEQUENCES OF NEGLECT AS REGARDS ACTIONS ON BAIL BONDS AND PROCEEDINGS AGAINST SHERIFF.

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First, Introductory Observations upon Arrests.—The right to arrest a debtor for a sum of 20*l.* or upwards and the requisite affidavit of debt have not been materially altered by the uniformity of process act, 2 W. 4, c. 39, or any other very recent act or rule, (excepting the 7th, 8th, and 9th rules of Hil. T. 2 W. 4, hereafter noticed,) and the same with its incidents have been so ably and scientifically examined by Mr.

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Introductory observations on the law of arrest, and further reasons for and against arresting a debtor.

(a) As to the other proceedings, see *ante*, Table of Contents of Chapter VIII. fully.

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Tidd, that it would be vain, and indeed redundant to attempt here to enlarge on this part of the practice. (a) Perhaps, however, a concise collection of the principles, enactments, and rules, incorporating the most recent alterations and decisions, may be acceptable to students and practitioners. (b)

The law of *arrest*, in civil actions, has greatly varied at different periods of history. Anciently, no person could be arrested excepting for a *crime*, or a *trespass vi et armis contra pacem domini regis*, (c) and not for any *mere debt*. An arrest was permitted in the former case, because it was considered that such a wrong doer was, in some respects, a criminal, liable as well to make compensation to the party injured, as to pay a fine to the king for the breach of his peace, and consequent injury or bad example to society, and therefore it was supposed that he would probably escape or elude justice, unless *his forthcoming were secured*; but in the latter case of a *debt*, no such presumption was indulged, and it was considered that when a creditor had voluntarily given credit to his debtor, he ought not to be allowed suddenly to withdraw that credit and confidence; besides, as there was no legal presumption of the existence of a debt until it had been established by a verdict, there was no reason in favour of imprisonment on mesne process, and a mere *ex parte* assertion of the creditor. That immunity from arrest, or rather *limit* to the writ of *capias*, was first broken in upon by the statute Marlebridge, (d) which allowed a *capias* to *arrest the person* in actions of *account*, although no breach of the peace was even suggested; and the 25 Ed. 3, stat. 5, c. 17, first gave a *capias* in actions of *debt* and *detinue*; and the 19 Hen. 7, c. 9, authorized that process in *actions on the case*, which included actions of *assumpsit*. (e) In practice, therefore, notwithstanding other constitutional principles in favour of liberty, until a party had been condemned by his peers, (*i. e.* at least until after *verdict* and *judgment* in favour of the claim,) it had before the 12 G. 1, c. 29, become the *practice* for a plaintiff to arrest a defendant for any supposed cause of action for which a *capias* could issue, and even without the plaintiff's making any affidavit of the debt or damages amounting to any particular sum, and even without leave of the Court or a judge. That act imposed in modern time the first restraint on arrests, by expressly requiring an *affidavit* of a *cause of ac-*

(a) Tidd's Practice, vol. i. also T. Chitty's 4th edit. of Archbold's Prac. K. B.

(b) It is proposed also, in a chapter immediately following *this part* of the work, to take a practical view of the enactments, which, it is expected, will,

ere long, be introduced, altering, in some respects, the law of arrest.

(c) 3 Coke, 12.

(d) Of Marlebridge, 52 Hen. 3, c. 23; and of Westminster, 2, 13 Edw. 1, c. 11.

(e) 3 Bla. Com. 281; Tidd, 128.

tion, (it will be observed, not in terms a *debt*) amounting to 10*l.* or upwards, (afterwards increased by 7 & 8 G. 4, c. 71, to 20*l.*) and which is the still existing regulation. It enacted, that unless there be an affidavit of a *cause of action* to the amount of 10*l.* (now 20*l.*) the plaintiff shall not cause the defendant to be arrested, but shall *serve* him personally with a copy of the process, and it is now indispensable that an affidavit of the cause of action to the extent of 20*l.* or upwards be *filed before a bailable writ can be issued, i. e. signed* by the proper officer, and the affidavit must be *left* if not *filed* with him immediately before he signs the writ. (e)

It has been justly observed, that it is curious to remark the changes which the law of arrest has undergone at different periods. (f) Anciently, as no *capias* (g) lay, an arrest was not allowed *except* in actions *vi et armis*; (h) afterwards an arrest was introduced with the *capias in other actions*; (i) and now by the operation of the before-mentioned statutes, an arrest *cannot* be had in the action wherein alone it was formerly allowed. (k) With the exception of, an *affidavit of the cause of action* being required by the statute of 12 G. 1, c. 29, there was no *express* limit to the claims for which an arrest might be made, and it was the practice for plaintiffs to hold to bail in *trover* and *detinue* for the sworn value of personal property detained or converted; (l) until a *rule for all the Courts* was made that no person should be held to special bail in an action of *trover or detinue*, without an order made for that purpose by the lord chief justice or one of the judges. (m) In all other actions, although the words of 12 G. 1, c. 29, are "*cause of action*," the rule is, that the plaintiff cannot of his own accord, even upon an affidavit, arrest the defendant, unless the claim be in the nature of a *debt*, because it would be unreasonable that a defendant should be arrested for what damages the plaintiff might *fancy* he had sustained and venture to swear to; (n) and where the damages are altogether uncertain, as in *assumpsit* or *covenant* to *indemnify*, or in actions for a *tort or trespass*, there

(e) *Hawkins v. Baskerville*, 2 Ken. Rep. 374.

(f) Tidd, 9th ed. 163; and see *id.* 128.

(g) So called, because when in Latin the writ commanded the sheriff, by that word, to take the defendant.

(h) *Et contra pacem*. Originally in all actions of trespass there was a *capiatur pro fine* payable to the king, 3 Coke, 12.

(i) See Tidd, 128, and 3 Bla. Com. 281, as to where a *capias* to take the person might be issued under different statutes.

(k) i. e. an action of *trespass*; but still the defendant may be arrested in an action of *trespass*, as for a *sea battery*, upon a judge's order.

(l) *Bungley v. Titcombe*, 6 Mod. 14; *Le Writ v. Tolcher*, Barncs, 80; *Catlin v. Catlin*, 2 Stra. 1192; 1 Wils. 23, S. C.; *id.* 335; *Sayer*, 53; *Charter v. Jaques*, Cowp. 529.

(m) R. H. 48 Geo. 3, K. B., C. P., and Exchequer, 9 East, 325; 1 Taunt. 203; Man. Ex. Append. 225; 8 Price, 507; Tidd, 172.

(n) Tidd, 172.

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cannot be an arrest without *an order of the Court*, or now in practice, *of a judge*, on an affidavit stating *very fully the circumstances*. (o) But as the statute 12 G. 1, c. 29, does not limit an arrest to actions for *debts*, a judge might make an order to hold to bail *in every description* of action, and for every *tort* if he should think fit, and it is usual to make an order to hold to bail in an action for a battery or imprisonment committed on board a ship, or abroad, when it is sworn that it is expected that the defendant will leave England, and thereby render it doubtful whether the plaintiff will ever be able to enforce payment of the *damages* that it may be expected will be recovered, unless he have the security of bail. (p)

(o) *Haiderweek v. Catmur*, Barnes, 61; *Russell v. Cately*, id. 76; *Le Writ v. Tolcher*, id. 79; *Whittingham v. Coghlan*, id. 80; *Reynoldson v. Blades*, id. 108; *Stapleton v. Baron de Stark*, id. 109; *Pr. Reg.* 63, 66; *Tidd*, 172.

(p) See cases, *Tidd*, 172 to 178. As to the foreign law of arrest, see *Code Nap.* and 4 *Pardessus*, 235; *De la Contrainte par Corps*. In some parts of the Continent, as at Frankfort-sur-Main, there may be an arrest upon an English judgment, or on a bill of exchange, &c.

Probably in this commercial country, where the giving credit may be essential, the law of arrest, as it stands, is not so objectionable as some have insisted, but only its abuse. It is a moral obligation of every individual to ascertain with certainty his ability to pay with punctuality before he contract a debt; and if he do not punctually perform his engagement, he has been guilty of deception that may be equivalent to actual fraud in its consequences to the creditor. It is therefore of importance to the creditor that he should be afforded a speedy and secure mode of enforcing payment, without which he might, perhaps, in his turn, be unable to perform his own engagements, and his own ruin might be the result, whilst the unprincipled debtor might be continuous in his career of extravagance. Debtors should be protected from unnecessarily harsh measures, and in practice an arrest should not be resorted to excepting when there is imperative necessity, and should never be adopted as a means of revenge. But on the other hand, the just interests of creditors ought not to be lost sight of, still less sacrificed, in favour of at least an incautious debtor.

We have already made some observations for and against proceeding by arrest, (*ante*, 137 to 140.) but the subject deserves further consideration.

Experience and observation establish that the majority of attorneys and solicitors, and all who are respectable, endeavour to moderate the desire of clients to

arrest a debtor. The following reasons for or against an arrest may be suggested to the client, and some have been already stated, (*ante*, 137 to 140). *First*, and principally, the security of the defendant being forthcoming at the determination of the suit so as to be compelled to pay the debt and costs, or render himself to prison, or his bail doing so for him, may be essential; for otherwise, just before execution, the defendant may remove his property and himself to a foreign country, and the plaintiff may lose his debt and the costs expended in endeavouring to recover it. *Secondly*, The probability of the defendant paying the debt and costs within the twenty-four hours allowed him before he can legally be taken to prison, so as to avoid exposure, and trouble to friends to become bail to the sheriff, with an increase of expense, when, if he were only served with process, he might from indulgence or perverseness neglect to exert himself to discharge the debt. *Thirdly*, The chances of the defendant either not being able to procure bail above to justify, or of accident preventing them from attending in due time, or some flaw in the defendant's proceedings; in consequence of which, as technically termed, the *sheriff may be fixed*, and compelled to pay the debt and costs, or be attached. *Fourthly*, If bail above be perfected, perhaps on the trial it may turn out that one of them was a material witness for the defence, and that from want of having changed such bail in due time, the defendant will be deprived of his testimony, and on that account fail in perhaps an unjust or mere technical defence. *Fifthly*, The bail being responsible for the result, will probably watch the defence, and as they will be liable to pay the increased costs, or render the defendant, they will stimulate the defendant to settle the action, and assist him in so doing; or, *sixthly*, they may threaten to render the defendant, and to avoid which he will, if possible, raise and pay the money to avoid imprisonment.

Reasons in favour of arresting.

But there may be *practically very important reasons against* arrest; thus, *first*, that a plaintiff by swearing to a debt incurs the risk of an *immediate indictment for perjury*, supported by the evidence of the arrested defendant, and which, even if ultimately unsuccessful, would occasion great uneasiness of mind and anxiety amongst his friends during its pendency, and perhaps an injurious suspicion that the prosecution is well founded; and even though a claimant be positive that a named sum is due to him, yet it is unsafe to swear to the debt, unless he is in possession of *certain* evidence to prove it on the trial of an action at law. (q) *Secondly* is to be considered, the liability at common law to an *action for a malicious arrest* in case the full sum sworn to should not ultimately be proved to be due, in consequence of the failure in proof on the part of the plaintiff, or of the defendant proving a set-off, which the plaintiff had forgotten, reducing the balance below the sum* sworn to; although it would seem that to sustain such action there should be not only evidence of the *want of probable cause* for the arrest, but also that it was malicious. (r) But it should seem that the question of malice is to be left to a jury, and that from the absence of probable cause the jury may infer malice. (s) *Thirdly*, the probability that if an *actual arrest* should be for a sum much larger than that *recovered* by verdict and judgment, the Court would, under the 43 G. 3, c. 46, disallow the plaintiff's costs, and award costs to the defendant. (t)

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Reasons against
arresting.

(q) *Ante*, 118; *Summers v. Grosvenor*, 4 Tyr. 222; *Griffith v. Pointon*, 2 Nev. & Man. 675, S. P.

(r) *Spence v. Jacob*, 1 M. & M. 280; 2 Stark. on Evid. 498, n. (k); and see distinction in *Dowlan v. Brett*, 10 B. & C. 118; and see case at Guildhall, October, 1825, 3 Bla. Com. 126, in note.

(s) *Austin v. Debenham*, 3 B. & C. 139; 4 *id.* 21; 2 Stark. Evid. 499, n. (t); *Cotton v. James*, 1 Barn. & Adol. 128; 3 Bla. Com. 126, in note.

(t) *Summers v. Grosvenor*, 4 Tyr. 222; *Rowe v. Rhodes*, 4 Tyr. 216. *Aliter*, if a smaller sum be paid into Court and taken out by plaintiff. As to necessity for *actual arrest* to entitle a defendant to costs, see *Bates v. Pilling*, 4 Tyr. 231. The 43 G. 3, c. 46, is now very liberally construed *against arrests* when a plaintiff does not *recover* so much as he swore to. It extends to claims reduced below the sum sworn to by an *award*, 2 Crompt. & Mee. 344; *Summers v. Grosvenor*, 4 Tyr. 222; *Griffiths v. Pointon*, 2 Nev. & Man. 675. And it suffices to prove the want of *reasonable or probable cause* for the ar-

rest, and it is not necessary to prove *malice*. And although the plaintiff failed in establishing the sum sworn to on account of some legal objection, or from inability to prove the defendant's verbal promises to pay, and from receipts being unstamped, yet the case was held within the 43 G. 3, c. 46, *Dowlan v. Brett*, 10 B. & C. 117; *Erle v. Wynne*, 3 Tyr. 586. And if a buyer's claim is merely for *unliquidated damages*, as in case of a breach of warranty, and he nevertheless venture to swear to a debt as for money had and received, the arrest is considered to have been without *reasonable cause*, and he may be deprived of his costs, *Gompertz v. Denton*, 3 Tyr. 232. So if a vendor arrest for the *full price of goods* when *half the price* was to be paid by a bill at three months not expired, the case is within the act, *Dry v. Pictou*, 10 B. & C. 120; and so where the plaintiff had agreed to take back goods he had sold to the defendant, and which were of bad manufacture, and yet he arrested the defendant, he was compelled to pay costs, *Lenley v. Bates*, 2 Tyr. 725; 2 Crompt. & Jer. 639.

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Fourthly, the defendant, and perhaps his relatives and friends, stimulated by the arrest to revenge, will probably endeavour to injure the plaintiff in his business, and otherwise will take advantage of every irregularity in his proceedings, to which if the defendant had been merely served with process, they would be ashamed of objecting. *Fifthly*, if the defendant be unable to pay *all* his creditors, he will probably prefer all others to the plaintiff, and just on the eve of execution for the debt and accumulated costs, will effectually assign his property to some favoured creditor, who had shewn him more lenity, and leave the plaintiff to lose the debt and costs. (u).

Secondly, When or not an arrest can be safely made respects evidence of the debt.

Secondly, Before swearing to an affidavit of a *debt* as of course, or to an affidavit of a *cause of action* in order to obtain a judge's order, it is essential to ascertain whether the plaintiff who is to make the affidavit of debt has any *sufficient legal and admissible evidence* to prove such debt upon a trial, for otherwise it has been decided, that although the plaintiff may conscientiously believe, or even *positively know* that the debt justly exists, yet he ought not to arrest the defendant, for if he issue bailable process and do not succeed in *proving* the sum

Other reasons against arrest.

(u) *Holbird v. Anderson*, 5 Term Reports, 235. To the above legal and practical consequence, others of a *moral but occasionally important nature may be added*. Thus a defendant arrested and pressed by his creditor, may give way to morbid feelings, and rather die in prison than exert himself to discharge the debt. The plaintiff will have throughout the cause to encounter the positive injury to his own health, or at least his mental enjoyments, very frequently resulting from the indulgence of a revengeful spirit, and the reflection that he has torn a fellow-creature from his family, and deprived him of the means of supporting them, and sometimes perhaps separated him from a dying relative, or at least expedited his debtor's ruin, without any benefit to himself; and when by indulgence he might have received at least a part payment, and had the satisfaction of perceiving that his debtor had overcome his difficulties; besides the possibility of a change in his own circumstances, and of his having to pray indulgence even of his previous debtor, or his relatives or friends, and when he must expect retribution, and that indulgence will be shewn or withheld to him as he had evinced it to others.

It is much to be feared that most arrests are made in indulgence of a spirit of *revenge*, a motive as condemnable as it is

prejudicial to the individual influenced by it. Many instances have been known of creditors having threatened to arrest even a dying man, and even the actual arrest of a dead body, as in the instance of Dryden, stated by Dr. Johnson in his life, but which Lord Ellenborough declared to be an indictable offence, *Jones v. Asburnham*, 4 East's Rep. 455; and 1 Smith, 188. Speaking of an unfortunate debtor with a family of seven children, having in consequence of severe illness been sued for and taken in execution in a borough Court *for a debt of only eighteen shillings*, one of the editors of the first influential public journals in A.D. 1834, thus observed:—"Thus was a young man disgraced like a felon, his character blasted, all the worst passions engendered, familiarized with a prison, rendered desperate and exasperated against the laws of his country, irritated to the highest degree with society altogether for permitting the infliction of such severe punishment upon one of its members merely for becoming indebted in a few shillings whilst temporarily endeavouring to save a starving family, and all this occasioned by an honest man being out of employment for a short time, and owing without costs *only four shillings for bread*, which for the moment he was unable to pay."

sworn to to have been due, he may at least be subjected to costs under 43 G. 3, c. 46, s. 3. (v)

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Thirdly, The next inquiry must be, whether the defendant has any *general* or *qualified* or *temporary privilege* from arrest that would render any affidavit useless. The privileges from arrest are either general and absolute, or limited and qualified as to time or place, and are expressly reserved and continued as before by 2 W. 4, c. 39, s. 19. (x)

Thirdly, Of the persons who may be arrested, and of the privileges from arrest.

Those of the former nature include the *King's immediate attendants and domestic servants*, such as one of the chaplains of the king, who, however numerous, cannot be arrested without leave of the Board of Green Cloth, (y) or a domestic herald of the king, if shewn to be in his actual service, but not otherwise, (z) and others who can shew that they are bound to attend the king when required; though the Courts are reluctant to discharge a defendant from an arrest at his instance, unless he shew that he has at least once *actually attended* the king, and *continues liable* to do so. (a) All the *Royal Family* and *Ambassadors* and their *servants* are also privileged. (b) So are *Peers*, whether English, Scotch, (c) or Irish, (c) although they have not any right to sit in the House of Lords. (c) *Peeresses*, and *Members of the House of Commons*, (d)

Absolute and general privileges from arrest.

(v) *Griffiths v. Pointon*, 2 Nev. & Man. 675; *Summers v. Gravenor*, 4 Tyr. 222.

(x) Tidd, 190 to 216.

(y) *Prior v. Dryden*, Exchequer, 31st January, 1835.

(z) *Leslie v. Disney*, 9 Legal Observer, 172.

(a) *Luntley v. Baltine*, 2 Barn. & Ald. 234.

(b) But the alleged servant must be in the actual service and employ of the ambassador. A chorister *bond fide* hired and paid for singing in a Roman Catholic chapel of an ambassador may be privileged; but *quære* whether the goods of such party are privileged against a distress or *fi. fa.* *Fisher v. Begrez*, 3 Tyr. 184.

(c) See recent cases as to the privileges of Irish peers, *Coates v. Lord Hawarden*, 7 B. & C. 388, and of a Scotch peer, *Digby v. Earl of Stirling*, 8 Bing. 55; and as to the privileges of Scotch peers from arrest, although not one of the sixteen peers summoned to parliament, the following amusing case is in point. The Lord Mordington, who was a Scotch peer,

but not one of those who sat in parliament, being arrested, moved the Court of Common Pleas to be discharged, as being entitled by the act of the Union to all the privileges of a peer of Great Britain, except a seat in parliament, and prayed an attachment against the bailiff, upon which a rule was made to shew cause. And thereupon the bailiff made an affidavit, viz. what was considered an *exculpatory*, that when he arrested the said lord he was so mean in his apparel as having a worn out suit of clothes and a dirty shirt on, and but sixpence in his pocket; that he could not suppose him to be a peer of Great Britain, and, therefore, through inadvertency arrested him. The Court discharged the lord, and made the bailiff ask pardon. *Lord Mordington's case*, Fortescue, 165.

(d) And if a person who has been arrested become a member of parliament, the Court on motion pending the action will order an *exoneretur* to be entered on the bail-piece, *Phillip v. Wellesley*, 1 Dowl. 9.

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the *Judges*, and even *Serjeants*, (e) and *Attornies* and *Solicitors* who have taken out their certificates, and practised within a year and in more than a single instance, (f) (excepting when sued by a *side clerk* of the Court of Exchequer.) (g) *Bankrupts* who have obtained their certificates without fraud; *Insolvent Debtors* duly discharged; *married women* who have not obtained credit by deceptive means; *corporations* and *hundredors*, and *executors* and *administrators*, when sued in their representative character, have also a *general privilege* from arrest.

Temporary and
qualified privi-
leges.

Temporary or qualified privilege from arrest extends to all persons, either *necessarily or of right*, attending *any Court or forum of justice*, whether as a party interested or as a witness, barrister, attorney or juror, and *eundo, mórando et redeundo*, i. e. *going to, staying at, or returning from the Court*, (h) or on a matter of arbitration referred to a *private arbitrator*; (i) and a party whilst proceeding to a Court to be present on the trial of his cause, (k) and a petitioning creditor returning from attending before the commissioners, though merely to watch the proceedings and offer himself as assignee, are thus privileged. (l) *Barristers* are not only privileged whilst going to or attending or returning from any Court on a particular day, but are so also throughout an entire circuit. (m)

But the *privilege* from arrest *eundo, mórando, et redeundo* is confined to *civil* proceedings, and a defendant who has been in custody on a *criminal charge of felony*, and has been acquitted and discharged, is not privileged from arrest on his return home; and the Court will not relieve him from such arrest, (n) unless it appear that his apprehension on the criminal charge was a contrivance by the plaintiff to get him into custody in the civil suit. (o)

As regards *attornies* their general privilege from arrest is preserved by 2 W. 4, c. 39, s. 19. (p) But it has been recently

(e) 1 Arch. K. B. 4th ed.

(f) 1 Dowl. Rep. 208; 2 W. 4, c. 39, s. 19.

(g) *Stokes v. White*, 1 Crompt. M. & R. 223.

(h) *Rex v. Blake*, 2 Nev. & Man. 312. A party to a writ of error or appeal in the House of Lords may, on petition, obtain an antecedent protection against his arrest pending the hearing, see *Pulmer's Pr.* 85.

(i) *Spence v. Stuart*, 3 East, 89; *Ran-*

dall v. Gurney, 3 Barn. & Ald. 252; 1 Chit. Rep. 679, S. C.

(k) *Pitt v. Evans*, 2 Dowl. 223.

(l) *Selby v. Hills*, 8 Bing. 166.

(m) *Hippesley's case*, 1 H. Bl. 686; *Lumley v. —*, 1 Crompt. & Mee. 579; 2 Dowl. 51, S. C.

(n) *Goodwin v. Lordon*, 1 Adol. & Ellis, 378; 3 Nev. & Man. 879.

(o) *Wells v. Gurney*, 8 B. & A. 220; *Barratt v. Price*, 1 Dowl. 725.

(p) *Ante*, 153.

decided that according to the rule in the Exchequer, there is no privilege against privilege, and that *Side Clerks of the Exchequer* are still entitled to arrest attorneys of the other Courts by *capias* of privilege; (r) but that privilege does not extend to attorneys of the other Courts, and therefore an attorney of the King's Bench cannot arrest an attorney of the Common Pleas, or vice versa. (s)

If a plaintiff or his attorney, knowing that a defendant is privileged from arrest, wilfully arrest him, a special action on the case may be supported, but not otherwise; (t) nor, as it seems, can in any case an action of *trespass* for arresting a privileged person be sustained; so that it is not prudent to risk an action for arresting a privileged person, unless clear evidence of the defendant's knowledge of the privilege, if not malice, can be adduced. (u)

The recent general rule, Hilary T. 2 W. 4, r. 7, prohibits a *second arrest* after non pros, nonsuit or discontinuance, without first obtaining a judge's order for the purpose. (x) But, as presently shown, a second arrest may be made, even upon the same affidavit and process, where the defendant has obtained his release by misrepresentation or fraud, or by giving a check that is not honoured. (y)

Fourthly, The 12 G. 1, c. 29, s. 2, requires an *affidavit* to be made and filed of a *cause of action* to the extent of 10*l.* or upwards, before the issuing of any bailable process, and which was increased by 7 & 8 G. 4, c. 71, to 20*l.* or upwards, and must by that statute and 43 G. 3, c. 46, be of an *original cause of action*, over and above costs, charges and expenses, and in the counties palatine to the extent of 50*l.* (z) The 12 G. 1, c. 29, s. 2, enacts, that *such affidavit* may be made before any judge or commissioner of the Court, out of which the process shall issue, authorized to take affidavits in such Court, or else before the *officer*, who shall issue such writ, or his deputy, and who is to have a fee of 1*s.* for such affidavit, and no more; section 2 enacts, that unless such affidavit of the plaintiff's cause of action be made, the plaintiff *shall not proceed to arrest the*

Fourthly, Of the requisite *Affidavit to hold to bail*.

Express requisites by statutes and rules.

(r) *Stoker v. White*, 1 Cr. M. & R. 223.

(s) See observations in *Stoker v. White*, 1 Cr. M. & R. 230.

(t) *Stoker v. White*, 1 Cr. M. & R. 223; 4 Tyr. 786.

(u) *Id. ibid.*; *Tarlton v. Fisher*, 2 Doug. 671.

(x) See the instances in which a second arrest may be ordered, *Amon*, 1 Dowl. 59; *Mellis v. Evans*, 1 Cromp. & J. 82; *Hamilton v. Pitt*, 7 Bing. 230; *Wilson v. Hamer*, 8 Bing. 54.

(y) *Castellow v. Freeman*, 1 Cromp. & M. 536.

(z) 7 & 8 G. 4, c. 71. •

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defendant. It should seem, therefore, if there should be no affidavit whatever, an arrest *would be void*, and subject the plaintiff and his attorney to an action for false imprisonment, (a) and a small mistake, as maketh and saith, omitting "oath," or maketh oath and *said*, (instead of *saith*,) would be fatal. (b) But the consequences of a mere imperfection, constituting an irregularity, would, at least as regards the interference of the Court on motion, be aided by putting in bail above. (c) The general rule, Hilary term, 2 W. 4, r. 7, prohibits a *second arrest* after non pros, nonsuit or discontinuance, without the order of a judge; (d) and the 8th rule requires affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, to swear that the money was paid, and the work done *at the request of the defendant*; (e) and rule 9 orders that no *supplementary affidavit* shall be allowed to supply a deficiency in an affidavit to hold to bail. (f)

Affidavit not considered the commencement of action.

Title of affidavit not to be in a cause.

An affidavit to hold to bail is not considered as the commencement of the action, or as a proceeding therein; and therefore, although an action be discontinued, such termination of the suit will not affect the affidavit, but it may be again acted upon in support of a fresh action, and a new affidavit is not necessary. (g) For the same reason, as there is no action pending, such affidavit is not to be intituled in any cause as between the parties or otherwise, and it would be improper to describe the claimant or debtor as plaintiff or defendant. (h)

Form and requisites of such affidavit. (i)
Title of Court, but not in any cause.

An affidavit to hold to bail is in general *intituled* in the Court in which it is to be used, as thus: "In the King's Bench," or "In the Common Pleas," or "In the Exchequer of Pleas." (i) The fourth rule of Court of Hilary term, 2 W. 4, directs that an affidavit sworn before a *judge* of any of the Courts of King's Bench, Common Pleas or Exchequer, shall be received *in the*

(a) *Olaver v. Price*, 3 Dowl. 261.

(b) *Harwood v. —*, 1 Gale's Rep. Exch. 47.

(c) Per Bayley, J., *Dalton v. Barnes*, 1 Maule & S. 250; *D'Argent v. Vivant*, 1 East, 230; *Shawman v. Whalley*, 6 Taunt. 185; 5 Moore & S. 94; Tidd, 188.

(d) See Jervis's Rules, 43, note (h), for the prior decisions.

(e) See prior decisions, Jervis's Rules, 44; and that a *preceding request* is necessary, see observations, *Exall v. Partridge*, 8 Term Rep. 310; and 1 Saunders' Rep. 264, note (1); see decisions in the King's Bench and Exchequer to the same effect before this rule, *Leaves v. Hucker*, 2 Tyr.

161; 2 Crom. & Jerv. 44, S. C.; *Marshall v. Davison*, 2 Tyr. 315; but the Court of Common Pleas held otherwise, *Reeves v. Hucker*, 2 Crom. & Jer. 44, and therefore the Rule of Hilary term, 2 W. 4, was promulgated.

(f) See Jervis's Rules, 44, note (j), and Tidd, 189.

(g) *Richards v. Stuart*, 10 Bing. 322; 3 Moore & S. 778; *Coppin v. Potter*, 10 Bing. 441.

(h) *Urquhart v. Dick*, 3 Dowl. 17; 9 Legal Obs. 222.

(i) See the general requisites of affidavits and exception, *post*, Chapter on Motions; and 1 Arch. K. B. 96.

Court to which such judge belongs, although not intituled of that Court; but not in *any other Court*, unless intituled of the Court in which it is to be used. (k) But that rule does not apply to an affidavit sworn before a *commissioner* of one of the Courts, if by the jurat it appear to have been sworn before such commissioner; even in Scotland, it need not be intituled of the Court. (l) The affidavit should not be intituled in *any cause*, because it is sworn *before* the inception of an action. (m)

In the King's Bench there was an express rule of Court, requiring the true place of abode and *addition* (i. e. rank, degree, profession, trade or occupation, &c.) of every person making any affidavit to be inserted therein; (n) but there was no such rule in the Common Pleas. (o) Now, however, the *general rule* for all the Courts of Hilary term, 2 W. 4, r. 5, expressly orders that "the *addition* of every person making an affidavit shall be inserted therein;" (p) and if the statement of the deponent's *present* residence or place of abode, or proper addition, should be omitted in an affidavit to hold to bail, the defendant arrested thereon would be discharged out of custody, or the bail bond cancelled, on the defendant's entering a common appearance. (q) The object of these rules was *the better to identify* the deponent, so that the proper party might afterwards be indicted in case of perjury; and the last general rule extends as well to affidavits in an advanced stage in the cause, as to affidavits to hold to bail. (r) But it has been decided that the residence of a deponent is properly stated "as clerk to S. A. and J. J. S. of Chiswell Street, in the county of Middlesex, Stable Keeper," without more particularly stating his own residence. (s) But there is no necessity to state the residence of the *defendant* when not a deponent, and if unnecessarily stated in the affidavit, a variance in the description of the residence in the *capias* will not be material. (t) It would be difficult to enumerate all the decisions on the older rules of Court relating to the consequence of insufficient state-

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abode, addition
of rank, degree,
profession, oc-
cupation, trade,
&c.

(k) See *Jervis's Rules*, 42, note (e).

(l) *Urquhart v. Dick*, 3 Dowl. 17; 9 Legal Obs. 222; and see *Bland v. Drake*, 1 Chitty's R. 163; *Howell v. Wilkins*, 7 Bar. & Cres. 783.

(m) R. T. 37 G. 3, 7 T. R. 454, in K. B., but formerly contra in C. P. Tidd, 174.

(n) Rule Mic. 15 Car. 2, reg. 1, K. B.; R. M. 37 G. 3, 7 Term R. 454; *Jarrett v. Dillon*, 1 East, 18, 330; 2 Bar. & Cres. 563; 4 Taunt. 154.

(o) 6 Taunt. 73; Tidd, 179.

(p) See *Jervis's Rules*, 43, note (f); and prior decisions still applicable, Tidd, 179.

(q) *Lawson v. Case*, 1 Cromp. & M. 481; *Jarrett v. Dillon*, 1 East, 18; 1 Arch. K. B. 96.

(r) *Lawson v. Case*, 1 Cromp. & M. 481.

(s) *Alexander v. Milton*, 2 Tyr. 495; 2 Cromp. & J. 424, S. C.

(t) *Buflle v. Jackson*, 2 Dowl. 505; *Welsh v. Longford*, id. 498.

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Statement of
the names of
the parties.

Cause of action
and requisite
precision in
statement there-
of in affidavit.

The principle
upon which
great certainty
and precision
required in an
affidavit.

ments of the addition of abode or degree, in affidavits to hold to bail, most of them have been collected in the best modern works. (u)

The names of the parties, especially of the defendant, must be accurately stated; but we have seen that the recent act, 3 & 4 W. 4, c. 42, s. 12, and rule 32, Hilary term, 2 W. 4, introduced exceptions, where the plaintiff had used due diligence to ascertain the correct name. (x)

The statutes 12 G. 1, c. 19, s. 2, and 43 G. 3, c. 46, s. 1, 7 & 8 G. 4, c. 71, s. 1, require the affidavit to show "an *original cause of action to the extent of 20l. or upwards*." The term "*original*" was introduced to prevent an arrest for a claim increased by costs. The words "*cause of action*" mean a *present right of action*, and as regards affidavits to hold to bail, import a *contract* or liability express or implied, and a *breach* of such contract, and is confined only to *debts* completely overdue, so as to exclude a claim *debitum in presenti*, but *solvendum in futuro*, unless a judge should think fit to make his *special order* to hold to bail, and which he sometimes will do, even for an *assault and battery*, especially when committed by a naval person, who is likely to leave the kingdom, and perhaps will long continue abroad. The affidavit must therefore be *certain* and *explicit*, and so *positive* as to a *subsisting* and *continuing* debt, that in case it be untrue, the party making it will be liable to an indictment for perjury; (y) and it must, in technical language, be certain to *every intent*, and cannot be supported by mere *inference* or *legal* deduction, or conclusion, (z) and should at least contain such averments, and certainty as would be essential on special demurrer to a declaration, or at least it should be as certain as a count in a declaration, and which indeed must afterwards conform. It has been well observed that the strictness required in affidavits to hold to bail is required not only to protect the liberty of the subject and guard defendants against the consequences of perjury, but also to guard those who make the affidavit against any *misconception of the law*, and that therefore the *leaning should always be to great strictness of construction, where one party is to be deprived of his liberty by the ex parte act of another*. (a)

(u) Tidd, 9th ed. 182 to 190; 1 Arch. K. B. 4th ed. 97 to 105.

(x) *Ante*, 165, 166. See the decisions and forms, 1 Arch. K. B. 97.

(y) Tidd, 182; *Tucker v. Francis*, 4 Bing. 142; *Bennett v. Dawson*, *id.* 609.

(z) *Smith v. Escudier*, 3 Tyr. 219.

(a) Per Lord Ellenborough, in *Taylor v. Forbes*, 10 East, 316; and see *Bradshaw v. Saddington*, 7 East, 95; and see observation of Vaughan, B., in *Townsend v. Burns*, 2 Crom. & J. 471; and see instances 1 Arch. K. B. 97.

Thus a person, who had of his own accord, and without request, paid money or performed work for the benefit of another, might fancy he was entitled to swear that the defendant was indebted to him, whereas the law declares that a person cannot so constitute himself creditor of another without his concurrence, and therefore the recent rule requires the deponent to swear that the money was paid or the work done at the request of the supposed debtor. (b) Indeed it would almost seem that disapprobation of arrests had induced the Court in some cases to require even greater distinctness, and particularly in an affidavit to hold to bail, than would be essential to subject the party to an indictment for perjury, which was at first the only general requisite; thus an affidavit to hold to bail the drawer of a bill, or indorser of a note, must state that the acceptor or maker had not paid the amount, (c) and an affidavit for money lent must shew that the loan was to the intended defendant, (d) and yet it is clear in both cases that, unless the defendant was *really indebted* at the time of so swearing, the deponent would be *indictable for perjury*, and if the acceptor or maker had already paid the debt, then it is scarcely possible to put a case in which the arrested party could still be indebted. So an affidavit to hold to bail on a bill or note should shew the date and time when it was payable, or expressly swear that it was payable on an antecedent day, for otherwise, on the doctrine of *debitum in presenti solvendum in futuro*, the affidavit that the defendant was indebted might be true, although the bill was not yet due. (e)

For debts acknowledged to be due by the defendant's *signature to a written instrument*, especially when he has authorized the circulation of a *negociable security*, there is so strong an inference of the existence of a just debt, that even in many places on the continent (where arrest in general is not permitted) arrest is allowed upon such instruments, (f) and less strictness should then be required in the affidavit than in other cases. It is now clearly settled *not* to be necessary to state the *date* of a bill of exchange in an affidavit of debt, and it suffices to shew that the time of payment is now passed; (g) and if in an affidavit that an aggregate named sum is due upon a bill or note sworn to have been expressly payable with interest, and

(b) *Ante*, 332, note (e); and see *Gray v. Shepherd*, 9 Leg. Ob. 379, 380.

(c) *Smith v. Escudier*, 3 Tyr. 219.

(d) *Smith v. Stephens*.

(e) *Kirk v. Almond*, 2 Tyr. 316; 2 Crom. & J. 354, S. C.

(f) 4 Pardessus, 235; *De la Contrainte par Corps*, and in a late case so decided at Frankfort sur Main.

(g) *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 103, S. C.

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as due for principal money and interest, the principal sum and date when the same became due be stated, from which interest can be computed, that will suffice; (*h*) but if the amount of the *principal money*, payable by the bill, be not stated, and yet the affidavit be for interest as well as principal, then, according to the recent decisions, the affidavit will be insufficient, (*i*) if it profess to arrest for interest, but not otherwise; (*k*) for unless by the *express* terms of the contract interest has been reserved, (and which in that case must be stated,) there cannot be an arrest for *interest*; for although under the 3 & 4 W. 4, c. 42, s. 28, the jury *may* give *interest* if they think fit, that is contingent and discretionary, and therefore unless reserved by *express contract*, interest is not a *certain debt*, for which the defendant can be arrested, (*l*) and therefore an affidavit of debt for money lent and interest thereon is bad; (*m*) and this is the reason why in one case it was held that an affidavit to arrest on a bill of exchange or promissory note must state the amount of the *principal* money thereby payable, because otherwise the sum might be made up of partly of principal and the residue of interest, when the former might not have been the subject of arrest, (*n*) and an affidavit to hold to bail for principal and interest, without distinguishing how much for each, was on that account holden insufficient. (*o*) Sometimes, therefore, the affidavit to hold to bail on a bill or note states the debt sworn to be "*principal money* due and payable by the bill or note;" but the safest course is to set forth the date and all the other particulars of the bill. However, an affidavit to hold to bail for 50*l*. "for money paid and expended for the defendant's use, and at his request and *for interest agreed* to be paid thereon, is sufficient, because that imports an *express contract* for interest; (*p*) and an affidavit that the defendant "is justly and truly indebted in 500*l*. for money lent by the plaintiff to the defendant, at his request, and *for interest due on the said sum of 500*l*.*, and for money had and received, &c." is sufficient. (*q*) If an affidavit state that defendant is indebted on a bill of ex-

(*h*) *Rogers v. Godbold*, 3 Dowl. 106; *Brook v. Coleman*, 1 Croup. & M. 621; 3 Tyr. 592, S. C.; *Brown v. Jackson*, M. T. 1834, 9 Leg. Ob. 108; but see *Lewis v. Gompertz*, 2 Tyr. 317; 2 Croum. & J. 352, S. C. *semble*, *contra*.

(*i*) *Id. ibid.*; *Westmacott v. Cook*, 2 Dowl. 519; but see *Pickman v. Collis*, 9 Leg. Ob. 332.

(*k*) *Westmacott v. Cook*, 2 Dowl. 519.

(*l*) *Id. ibid.*; *Cullum v. Leeson*, 2 Cr. & M. 406; 4 Tyr. 266, S. C.

(*m*) *Cullum v. Leeson*, 2 Cr. & M. 406; 4 Tyr. 266, S. C.

(*n*) *Id.*; *Brook v. Coleman*, 1 Cr. & M. 62; 3 Tyr. 592, S. C.; but see *Phillips v. Turner*, Mich. T. 1834, 9 Leg. Ob. 110.

(*o*) *Latraille v. Hoepfner*, 10 Bing. 334; *Marnall v. Mathew*, *id.* 506.

(*p*) *Hutchinson v. Hargrave*, 1 Bing. N. C. 569.

(*q*) *Pickman v. Collis*, 1 Gale, Exch. Rep. 47.

change, payable at a day past, this suffices, without stating that the bill was not paid when due, or that it is still unpaid. (r) An affidavit to hold to bail an husband and wife, must shew that the goods were sold, or the cause of action accrued before the marriage; (s) and if at the suit of husband and wife, the affidavit must also shew that the debt accrued due before the marriage. (t) And an affidavit stating defendant to be indebted to plaintiff for goods sold by him and his *late* partner, without stating the *death* of the latter, is insufficient. (u)

If an affidavit to hold to bail for *several causes* of action should be defective as to one, it will be bad in toto, so as to entitle the defendant to be discharged out of custody; (v) and this rule prevails, although the affidavit swear to *separate* sums, and separate causes of debt, and all but one of them are correct. (x) Independently of the uniformity of process act and rules thereon, care must be observed that the affidavit is for the *same cause of action* as will accord with the *form of action* to be stated in the writ and declaration, or rather the writ and declaration should not vary from the affidavit, for otherwise in aailable action the bail will be discharged; and if the declaration should vary from the writ in the form of action, the former will, since the uniformity of process act, be set aside for irregularity. (y) But where the affidavit was for goods sold and money lent, and the declaration contained no count for goods sold, it was held no ground for applying to have an exoneretur entered on the bail piece. (z)

Of affidavits defective in stating cause of action.

Although *writs*, as we have observed, are usually on *parclement*, affidavits to hold to bail in all the Courts are written in words at length on *plain paper*, and without the least erasure, especially in the jurat, and are usually intituled in the proper Court; and to save time, the proper jurat is written before the

Practical proceedings with respect to the affidavit of debt.

(r) *Phillips v. Turner*, 3 Dowl. 163, S. P. in *Covenant*; *Lambert v. Wray*, *id.* 169.

(s) *Morgan v. Davis*, 5 Moore & Scott, 93.

(t) *Wade v. Wade*, 4 Bing. 50. The statement of the *cause of action* must necessarily vary according to the facts of each case. Those usually occurring are stated in the works referred to in the note *

(u) *Edgar v. Watt*, 1 Harrison R. 108.

(v) *Baker v. Wells*, 1 Crom. & M. 238; 3 Tyr. 182; *Kirk v. Almond*, 2 Tyr. 316; 2 Crom. & J. 354, S. C.

(x) *Id. ibid.*; *sed quære principle.*

(y) *Ante*, 194 to 199; *Scribner v. Waithing*, 1 Harrison Rep. 8.

(z) Per Littledale, J., *Gray v. Harvey*, 1 Dowl. 114; 1 Arch. Pr. K. B. [40], *sed quære.*

* Tidd's Forms; T. Chitty's Forms, 16 to 38; those on Bills and Notes Chitty on Bills, 8th edit. 773, 774; the substance also of the great variety of common counts in 2 Chitty on Pleading, 5th edit. 37 to 178, may readily be applied.

The forms of several *jurats* are given in Chitty's Summary of Practice, 316, 317; and T. Chitty's Forms, 16, 17; and see more fully, *post*, chapter on Affidavits and Motions.

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Before whom
affidavit to be
sworn.

deponent goes before the Court, judge, commissioner, or other officer authorized to administer the oath.

The 12 G. 1, c. 29, s. 2, enacts, "That the affidavit of debt *"may* be made before any judge or commissioner of the Court out of which the process shall issue authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy is hereby empowered to administer." Foreign affidavits are not affected by that act. (a) The 1 W. 4, c. 70, s. 4, impliedly authorizes the swearing an affidavit of debt before the judge of either of the superior Courts, though to be used in a Court of which he is not a judge; and an *affidavit to hold to bail* may be sworn before a commissioner, who is to be the plaintiff's attorney, and has already been retained in the cause; (b) and although it is expressly provided that *no other affidavit* pending the cause can be so sworn. When made in London it may be, and usually is, sworn before the officer who issues the process, or his deputy, under express enactment; (c) but if before the latter, he must have been expressly appointed to issue process, and not merely for taking affidavits; (d) and a deputy of a deputy is not within the act. (e)

It was recently decided that a *capias* issued *after* the uniformity of process act, upon an affidavit sworn *before* the passing of that act, before the deputy-signer of *Bills of Middlesex*, was not irregular; (f) but since that act, an affidavit to hold to bail in King's Bench must be sworn in Court, or before a judge or commissioner, or at the King's Bench office, and not at the Bill of Middlesex office.

In *Brett v. Hungal*, 11th June, 1834, in Bail Court of King's Bench, Mr. Justice Williams made absolute a rule nisi for discharging the defendant out of custody on common bail, on the ground that the affidavit to hold to bail was defective; because although it appeared to have been sworn before Mr. Horn, duly authorized to administer an oath, yet the *jurat* did not show that Mr. Horn was a commissioner of affidavits in the King's Bench, nor was the affidavit intituled "In the King's Bench." In another case it was held, that a *jurat* which stated the affidavit to have been sworn at Edinburgh, was not objec-

(a) Per Parke, B., in *Young v. Beck*, 1 Cr. M. & R. 455. As to *foreign* affidavits, see 1 Tidd, 181.

(b) R. E. 15 G. 2; R. H. 2 W. 4, r. 6.

(c) 12 G. 1, c. 29, s. 2.

(d) *Rogers v. Jones*, 7 Bar. & Cres. 86.

(e) *Hughes v. Jones*, 1 Bar. & Adol. 388.

(f) *Young v. Beck*, 1 Cr. M. & R. 448.

tionable on account of an omission to state the county within which that city is situate. (g)

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Many decisions are to be found in the books relative to the *jurat* or statement of the deponent having been sworn, but these will be more fully stated when we consider the requisites of *affidavits in general* in support of or against a *motion*. (h) The *jurat* must contain the *day*, *year*, and *place* of swearing the affidavit; (i) but "sworn at Edinburgh," without stating the county within which it is situate, suffices. (k) The statement of time is essential, because after the lapse of a year without any proceeding, there should be a fresh affidavit. (l)

The *jurat* of
affidavit.

The rule Mich. T. 37 G. 3, prohibits any *erasure* in a *jurat*, and this however plain the *jurat* may continue, whether in reading the same what has been erased or written upon the same be included or omitted. (m) The object of this rule was to prevent any ambiguity or doubt in the precise terms in which the defendant had sworn, which, if erasures were tolerated, might be rendered doubtful.

The *jurat* in England (though the reverse in Ireland) is usually subscribed at the left hand corner at the foot of the affidavit, and before the deponent is sworn he signs his name at the other corner, immediately under the last word of the body of the affidavit. The deponent is then sworn on the New Testament in these words, "The contents of this affidavit are true, so help me God," and he then kisses the book. If a Quaker, he thus affirms, "I solemnly affirm that the contents are true," and he does not kiss either Testament. For administering such oath or affirmation, the statute 12 G. 1, c. 29, enacts that a *fee* of one shilling shall be paid, and no more. In the country the deponent is usually sworn before a commissioner of the proper Court, and frequently (in this only instance of an affidavit to hold to bail) before the plaintiff's own attorney; but in London he is sworn before the officer who signs the writ, and who is to keep and file such affidavit.

The usual form of an affidavit to hold to bail is in the form given in the note. (n)

(g) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

404, 405; Rule M. 37 G. 3.

(h) *Post*; and see 1 Arch. 105; and a great variety of *jurats*, T. Chitty's Forms, 2d ed. 18, 19.

(k) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

(i) *Doe v. Roe*, 1 Chitty's Rep. 228; *Wood v. Stephens*, 3 Moore, 236; Tidd,

(l) *Burt v. Owen*, 1 Dowl. 691; and see 1 Arch. 108.

(m) *Williams v. Clough*, 1 Adol. & Ellis, 376.

(n) In the King's Bench, [or Common Pleas, or Exchequer of Pleas].

A. B., of Chelmsford, in the county of Essex, linen draper, maketh oath and saith

The usual form
of affidavit on a

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Defects in affidavits to arrest when to be objected to.

Although a *defect* in the affidavit to hold to bail may be substantial, yet it must, like irregularities in process, be objected to within a *reasonable time*, and before the plaintiff has taken any expensive proceedings, which would be deemed a waiver of the right to object; (o) and it is too late to object after the defendant has put in bail, (p) or after obtaining time for that purpose, (q) or after the time for putting in bail above has elapsed, (r) or the defendant has ineffectually attempted to justify bail, though the Court may be induced to give further time, partly in respect of an objection to the affidavit; (s) and when an affidavit has been expressly sanctioned by a judge by *his ordering* bailable process for a named amount, no objection can be taken with effect. (t) But delay in the application may be excused by the circumstance of the affidavit having been mislaid. (u) We have seen that the recent rule Hil. T. 2 W. 4,

promissory note, bill of exchange, goods sold, work done, money lent, paid, had, and received, and on an account stated.

that C. D. is justly and truly indebted to this deponent in the principal sum of £—, as indorsee of a promissory note dated on —, the — day of —, A.D. —, and made and signed by the said C. D., and for the payment of the said sum of £— to E. F. or order, at a certain day now past, and by the said E. F. duly indorsed to this deponent; and in the further principal sum of £—, as indorsee of a bill of exchange dated, &c. made and drawn by E. F. upon and accepted by the said C. D., and for the payment to the said E. F., or his order, of the said sum of £—, at a certain day now past, and by the said E. F. indorsed to this deponent; and in the further principal sum of —, for the price and value of goods sold and delivered by this deponent to the said C. D., at his request; and in the further principal sum of £—, for the price and value of work done, and materials for the same provided, by this deponent for the said C. D. and at his request; * and in the further principal sum of £—, for money lent by this deponent to the said C. D. at his request; and in the further principal sum of £—, for so much money paid by this deponent for the use of the said C. D., and at his request; * and in the further principal sum of £—, had and received by the said C. D. for the use of this deponent; and in the further principal sum of £—, for so much money before then found and acknowledged by the said C. D. to be due from the said C. D. to this deponent, upon an account stated and agreed by and between them, of divers sums of money before then due and owing from the said C. D. to this deponent.

Deponent's signature, A. B.

Sworn before a commissioner.

Sworn at —, in the county of —, on the — day of —, 1835, before me G. H., a commissioner for taking affidavits in the Court of King's Bench, [or Common Pleas or Exchequer.]

G. H.

Before signer of writs in K. B.

[Or if sworn in town in King's Bench,]
Sworn at the King's Bench office in the Temple, on this — day of —, 1835, before me,

S. W.

Before filacer in C. P.

[Or if sworn in town in Common Pleas,]
Sworn at the filacer's office in Elm Court, Temple, [or as the case may be,] this — day of —, 1835, before me,

F. F.

(o) *Morgan v. Bayless and wife*, 5 Moore & Scott, 93; 3 Dowl. 117, S. C.; *D'Argent v. Vivant*, 1 East, 33, 34; *Shawman v. Whalley*, 6 Taunt. 185.

(p) *Reeves v. Hacker*, 2 Tyr. 161; 2 Crom. & J. 44, S. C.

(q) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

(r) *Tucker v. Colegate*, 2 Crom. & J. 489; 2 Tyr. 496.

(s) *Morgan v. Davis*, 5 Moore & S. 93, 94; *Downes v. Witherington*, 2 Taunt. 213.

(t) *Brucknbury v. Needham*, 1 Dowl. 439.

(u) *Ladbrook v. Phillips*, 1 Harrison Rep. 109.

* These words are essential under the express rule, *ante*, 332, note (e).

r. 9, prohibits the use of a *supplementary affidavit* to supply any deficiency in the first. CHAP. VIII.
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The 12 G. 1, c. 29, requires that the affidavit to hold to bail shall be *filed*, and the same is always *left* in the office of the officer who *signs* the writ, and whose duty it is forthwith to *file* the same. But as the statute is silent as to the *time* of filing the affidavit, it would seem that if it has been *duly left in the proper office*, an arrest would not be set aside on account of the neglect of the officer to file the affidavit. (x) If however the affidavit be *left* by the plaintiff's attorney in a *wrong office*, and there filed, then the arrest and proceedings thereon might be set aside. (y) The *filing*, however, is by no means essential to complete the crime of perjury, which it is obvious must, in a moral view, be complete the instant the defendant has wilfully sworn the affidavit with intent that it shall be used. (z) Some attorneys, at the conclusion of the indorsement on bailable process, cause to be stated the *time* when the affidavit was filed, as thus: "Bail for £---, by affidavit filed 14th June, 1834, one o'clock, II. S." We have already sufficiently considered the question upon the necessity of filing a fresh affidavit or copy of the first, on issuing concurrent or continued bailable process. (a)

Fifthly, The proper and indeed *only* process upon which one or more defendants who is *at large* can be *arrested*, is a writ of *capias*, though when a defendant is already in custody in one of the prisons of the superior Courts, a writ of *detainer to continue* such imprisonment at the suit of the new plaintiff, is the proper proceeding, and which is to be considered in the next chapter. It had been supposed, shortly after the passing of the uniformity of process act, 2 W. 4, c. 39, that a *capias*, as authorized by that act, was entirely a new process; (b) but afterwards, in *banc*, it was held not to be entirely a *new* process, and that therefore until a contrary regulation had been made, it might be issued by the same officer as bills of Middlesex had previously been issued, and that the affidavit on which it was to be founded might therefore be sworn before the deputy signer of bills of Middlesex; (c) but now it would be otherwise. (d)

We have seen the *form* of a writ of *capias*, (e) and of *several indorsements*, (e) as prescribed by 2 W. 4, c. 39, s. 4.

(x) *Knowles v. Stevens*, 1 Crompt. M. & Ros. 26; *Snow v. Stevens*, 2 Dowl. 664; *ante*, 325, 2 Kenyon's Rep. 374.

(y) *Hussey v. Baskerville*, 2 Wils. 225.

(z) *R. v. Crossley*, 7 Term R. 315.

(a) *Ante*, 219.

(b) *Young v. Beck*, 2 Dowl. 462.

(c) *Young v. Beck*, 1 Cr. M. & R. 448, 41.

(d) *Ante*, 222, 223, note (p).

(e) *Ante*, 155, in note.

Fifthly, Of the writ of *Capias*, its form and requisites.

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12, 20, and by schedule No. 4, and that the 5th rule of Mich. T. 3 W. 4, referring to the rule of Hil. T. 2 W. 4, requires *an indorsement* of the claim for debt and costs in actions for *debts*. (f) And it might here suffice to refer to the previous pages, where those forms and requisites have been so fully considered. (g) But as the proceedings by *capias* to arrest a defendant are still so frequent, it may be useful to subscribe, in a note, the full form of that writ with references to the previous pages, where every part has been fully considered, together with some further annotations. (h)

(f) *Ante*, 160, in note.

(g) *Ante*, 162, to the end of Chap. V.

Full form of a writ of *capias*, with warnings.

(h) William the Fourth, (1) by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith. To the sheriff of —, greeting. (2) We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same (3) and take C. D. [defendant's full Christian and surname,] (4) of Maidstone in the county of Kent, (5) [his residence or supposed residence,] (5) and if there be more than one defendant, name them, (6) and the residence or supposed residence of each accordingly, if he (7) [or "they"] shall be found in your bailiwick, and him (7) [or "them"] safely keep, until he (7) [or "they"] shall have given you bail, (8) or made deposit with you according to law, (8) in an action on promises. (9) [or "of debt," or "of covenant," or "of detinue," or "of trespass," or "on the case," as the cause of action may be,] at the suit of A. B., (10) [or if more than one plaintiff name them all] or until the said C. D. [name all the defendants] shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. [name all the defendants]. (11) And we do hereby require the said C. D. [name all the defendants] to take notice, that within eight days after execution hereof on him [or "them,"] inclusive of the day of such execution, he [or "they"] should cause special bail to be put in for him [or "them,"] in our Court of King's Bench, (12) [or "Common Pleas," or

(1) As to the king's name, *ante*, 164.

(2) As to the sheriff or sheriffs, or other officer, *ante*, 165 to 190. If the defendant be in a county surrounded by another county, it may be advisable to direct the writ to the sheriff of the latter. See note 3, *infra*.

(3) This non omittas clause is now always inserted, *ante*, 190. If it be expected that the defendant may be found within a district or place, parcel of a smaller county, which is wholly situate within and surrounded by a larger county, as frequently occurs in cases of cities or towns which are counties of themselves, then it is most advisable to direct the writ of *capias* to the sheriff of the largest and surrounding county, because the defendant may then, provided the following clause be introduced into the *capias*, be arrested in either, by virtue of the 20th section of 2 W. 4, c. 39, *ante*, 153, in note. It will be observed, that the concluding part of that section seems to require such express clause, and which may be inserted in the writ, and be as follows: And take C. D. [naming him fully,] of —, in the county of —, if he be

found in your bailiwick, "or within any district or place which is parcel of the county of —, but is also wholly situate within and surrounded by your county of —."

(4) As to the name of defendant, *ante*, 165 to 174.

(5) As to description of defendant's residence, *ante*, 174; addition of degree, *ante*, 180; description of character, *ante*, 181.

(6) As to the names of several defendants, *ante*, 183.

(7) As to a mistake in *he*, *she*, or *they*, in this part of the writ, *ante*, 232, note (a).

(8) As to this direction, *ante*, 191.

(9) As to the form of action, *ante*, 194 to 199.

(10) As to description of plaintiff, *ante*, 199; and character, *ante*, 181, 200.

(11) As to the direction to the sheriff and the defendant, what each is required to do, *ante*, 191, 200 to 202.

(12) As to the description here of the Court in which defendant is required to put in bail, *ante*, 193.

In practice it is usual to purchase at a law stationer's a writ of *capias*, printed on parchment, with blank spaces, and copies with similar blanks, printed on paper. Such principal writ on parchment, with at least as many *copies* on *paper* as there are

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Practice to be observed in filling up the blanks in a writ of *capias*.

"Exchequer of Pleas,") to the said action, and that in default of his [or "their"] so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or *indorsed hereon*. (15) And we do further command you, the said sheriff, (14) that immediately after the execution hereof, you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said Court. Witness, &c. (15) at Westminster, the — day of —, in the year of our Lord, 1835. (16)

Memoranda to be subscribed to the Writ. (17)

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards. (17)

A Warning to the Defendant.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution. (18)

2. If a defendant being arrested on this writ shall have made a deposit of money according to statute 7 & 8 G. 4, c. 71, (19) and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution. (19)

3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond. (20)

4. If a defendant having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution. (21)

Indorsements to be made on the Writ of Capias. (22)

Bail for £—, by affidavit. (23)

Or,

Bail for £—, by order of [naming the judge making the order,] dated the — day of —, A. D. 1835. (23)

(13) The words in *italic* are usually printed in a *capias*, although the warning be in fact *subscribed*; but when so subscribed, it would seem more correct to omit those words, *ante*, 201, note (z).

(14) Or other officer to whom the writ is directed.

(15) As to the names of the chief justice or baron to be here inserted, *ante*, 202.

(16) As to the *teste*, *ante*, 202 to 205. As to the *signing* by the proper officer, *ante*, 222; and as to the *sealing*, *ante*, 224; and as to alterations and subsequent resealing, *ante*, 233.

(17) This and the following forms are prescribed by 2 W. 4, c. 39, schedule No. 4, *ante*, 155; and see *ante*, 205, 206.

(18) See *ante*, 201.

(19) The act referred to should have been 43 G. 3, c. 46, s. 2; see *ante*, 201.

(20) This implies also the giving notice of such bail having been put in within such eight days, *Grant v. Gibbs*, C. P. Hil. T. 1835; 1 Harrison & Hodges' Rep. C. P. 57.

(21) This refers to the enactment in 2 W. 4, c. 39, s. 4, where one of several defendants is not to be arrested, but only served with a copy of *capias*.

(22) This and the following forms are prescribed by 2 W. 4, c. 39, schedule No. 4, *ante*, 155, in note.

(23) See forms and decisions, *ante*, 207; and see a form directing sheriff not to arrest one of defendants, *ante*, 208.

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defendants, (i) are then to be very accurately and legibly filled up, and carefully examined by the party who may afterwards have to swear to his having personally served a copy on the defendants. It will be obvious that the blanks must be filled up according to the varying facts of each case; as 1st, the name of the king for the time being; 2ndly, the name of the county or district to the officer of which the writ is to be directed; 3dly, the Christian and surname of the defendants, and place, parish, and (to avoid discussion) county of the defendant's supposed residence; 4thly, the introduction of the description of *him, her, or them* in the third blank, the writ when in blank having in general already printed only the letter *h* in the centre of a blank; (k) 5thly, statement of the intended form of action; 6thly, Christian and surname of the plaintiff; 7thly, in the three following blanks, repetitions of the defendant's Christian and surname; 8thly, statement of the Court in which the defendant is to put in bail; 9thly, the name of the chief justice; and 10thly, the real day of issuing the writ. The several *indorsements* must then be observed as directed in the fifth chapter, to which the student and practitioner must constantly refer.

As far as regards the officer to whom the writ is to be *directed*, other forms are prescribed by the general rule Mich. T. 3 W. 4, to be observed in the *counties palatine*. (l)

Indorsements
on writ of capias,
as first of sum
sworn to.

The 12 G. 1, c. 29, s. 2, expressly requires that the sum or sums specified in the affidavit to hold to bail, shall be *indorsed* on the back of the writ or process, and only for which sum or sums so indorsed, the sheriff, or other officer to whom the process shall be directed, shall take bail and for no more. But that direction was considered merely directory to the sheriff,

This writ was issued by E. F. of —, attorney for the plaintiff [or plaintiffs] within named. (24)

Or,

This writ was issued in person by the plaintiff within-named, who resides at —, [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.] (25)

(24) As to this indorsement, *ante*, 208; and see form of an indorsement where one attorney acts as agent for another attorney, and required by rule M. T. 3

W. 4, s. 9; see *ante*, 209.

(25) As to this indorsement, see *ante*, 211. As to the indorsement of the claim for debt and costs, see *ante*, 212.

(i) It would also be a prudent precaution for fear of loss, to file or enter an exact copy in a book kept for that purpose in the attorney's office.

(k) *Ante*, 232, note (o).

(l) See forms in rules M. T. 3 W. 4, and *ante*, 185 to 190.

and that the omission did not vitiate.^(m) But now as the statute 2 W. 4, c. 39, in schedule No. 4, peremptorily requires *such indorsement*, and the rule Mich. T. 3 W. 4, declares that *all omissions* of any matter required by the statute shall constitute an *irregularity*,⁽ⁿ⁾ it follows that the omission of such indorsement would entitle the defendant to be discharged out of custody, or to have the bail bond cancelled on entering a common appearance.

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The 2 W. 4, c. 39, schedule No. 5, also requires an indorsement of the name and place of abode of the plaintiff's attorney, or of the name and place of abode of the plaintiff himself, if he sue *in person*. And the 7 & 8 G. 4, c. 71, s. 8, further entitles the sheriff or other officer required to issue a warrant to arrest, to insist on the plaintiff's attorney, or his clerk or agent, to write such indorsement in the *presence* of such officer, or he may refuse to grant the warrant.^(o) But at least when the plaintiff proceeds in person, and has indorsed on the writ a statement of his abode, &c. in pursuance of 2 W. 4, c. 39, schedule 5, it seems that the direction of 7 & 8 G. 4, c. 71, sect. 8, is virtually dispensed with, and the form in schedule 5 may be a sufficient precaution against any abuse ofailable process.^(p) As these are requisites of a general nature applicable to all mesne process, we have, to avoid repetition, considered the decisions respecting them in the fifth chapter, to which reference must be had.^(q)

Secondly, Indorsement by plaintiff's attorney of his name and place of abode, or by plaintiff, of his name, abode, and addition.

We have further seen that the rule of M. T. 3 W. 4, referring to the prior rule of H. T. 2 W. 4, requires that in actions for a *debt* the sum *bonâ fide* claimed for debt and costs shall be indorsed, with a notice, in a prescribed form, to the defendant, that if he pay the amount within four days no further proceedings will be had. We have, stated the consequences of any omission of or defect in such indorsement.^(r) We have suggested that since the 2 W. 4, c. 39, requires the supposed residence of the defendant to be stated in the *body* of the writ of capias, it is no longer necessary to indorse his full description as was previously required.^(s)

Thirdly, Indorsement in actions for a debt of the debt and costs claimed.

(m) *Ante*, 207, 208; *Whishard v. Wilder*, 1 Burr. 330; *Evans v. Bidgood*, 4 Bing. 63; *Millar v. Bowden*, 1 Crom. & J. 563.

(n) *Ante*, 208.

(o) *Ante*, 211.

(p) *Semble*, and see 1 Arch. Pr. C. P. [41].

(q) *Ante*, 208 to 212.

(r) *Ante*, 212 to 215; and see the form, *ante*, 209, 211.

(s) *Ante*, 215, 216.

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*Indorsement of
the day of issu-
ing a capias no
longer requisite.*

The statute 5 & 6 W. & M. c. 21, and 9 & 10 W. 3, c. 25, required the officer at the time he *signed* bailable process to *indorse* the day and year of so doing; (t) but that regulation was made when mesne process was tested in term, although issued in vacation, and in general bore a *fictitious date*, and even then the regulation was considered merely directory, and the non-observance did not render the proceeding irregular, and provided the teste was right it sufficed; (u) and as the 2 W. 4, c. 39, neither in its enactments nor its prescribed form of capias in schedule No. 4, requires any such *indorsement*, and now in lieu requires the writ in its body and conclusion to be tested of the *very day it is issued*, it seems to be no longer necessary to *indorse* the time of issuing this writ; and the former enactments are virtually repealed as respects such indorsement.

*The Præcipe for
a capias.*

A *Præcipe* (being, as we have seen, a short memorandum of the substance of the writ of capias and indorsements, or the particular facts in which one writ will differ from all others,) is then to be accurately made in the subscribed form; (v) and it is to be taken, together with the *writ* and *affidavit* to hold to bail and judge's order, if any, to the proper officer of the Court for *signing* such writ, differing, as we have seen, in each Court, but always the same, without regard to the nature of the writ. (y) Such officer may swear the defendant to the affidavit, and then file the *præcipe* with the affidavit, and deliver the *writ* to the plaintiff's attorney. We have already sufficiently considered the *utility of a præcipe* in all cases, and the absolute necessity for that document by a particular rule of the Court of Exchequer. (z) It was held in the Common Pleas

(t) *Impey's C. P.* 154.

(u) *Coleby v. Norris*, 1 Wils. 91; *Win-*

dle v. Ricardo, 3 Moore, 249; *Millar v. Bowden*, 1 Crompt. & Jer. 563.

Form of Præcipe for a writ of capias.

(x) See requisites of *præcipe* in general, *ante*, 220 to 222.

In the King's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

Middlesex.—Capias for A. B. and E. F. and G. H. against C. D. of — in the county of —, and L. M. of — in the same county, on promises, [or "in debt," or "in covenant," &c.] Tested the — day of —, A.D. 1835.

Indorsed oath for £— by affidavit filed, [or "by order of the Honourable Mr. Justice —, dated the — day of —, A.D. 1835."]

E. F. of — in the county of —, attorney for the plaintiff, [or if in person, A. B. of, &c. *ante*, 209, 211.]

Indorsed claim £— debt, and £— costs.

(y) *Ante*, 222, as to *signing writs*.

(z) *Ante*, 220, n. (c).

that the omission of any notice of the *ac etiam* in the *præcipe* at the time when that clause was essential in the process itself, was immaterial. (a) And although we have seen that in the Exchequer a *præcipe* with certain particulars is expressly required, it appears that in King's Bench and Common Pleas an omission or defect in that document would now be deemed immaterial. (b) But still it is *recommended in all cases* to adopt a full form of *præcipe* in the terms required in the Exchequer. We have seen that cases may occur in which the use of that document may be important; (c) and if there be two concurrent writs of *capias*, the *præcipe* for that secondly issued should refer to the affidavit first filed. (d)

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Sixthly, The *affidavit* to hold to bail having been either sworn or ready to be so when taken to the proper signer of writs, and the proper *præcipe* having also been prepared, the *capias* itself is then to be engrossed, or rather filled up, unless the names of the defendants are very numerous, on parchment previously printed with blanks, and which may be obtained at any law stationers, and at the same time at least as many similar blank writs on paper as there are defendants to be filled up; and the writ, with the copies, must have all the requisite notifications, memoranda, warnings, and indorsements on each. The writ on parchment is then to be taken to the proper officer of the Court for *signing* writs, (e) and who, after swearing the deponent to the affidavit of debt, (unless previously sworn,) will receive and file the affidavit, and then *sign* his name to the writ, the true teste or date of signing having immediately before been inserted.

Sixth, Practical mode of issuing a *capias*, viz. *Signing same*.

Seventhly, The *writ*, when to be returned in King's Bench and Common Pleas, is next to be taken to the *Seal-office*, at No. 3, Inner Temple Lane, and there duly impressed with the *seal* of the Court, and which completes the legal perfection of writ, as before shewn. (f) The *copies* of the writs are then to be carefully examined, and made precisely to correspond in every respect, even to a letter, or the deviation may be fatal, should the *sense* or *sound* be altered, but not otherwise. (g) We have seen that in the Exchequer the writ of *capias* is

Seventh, Of *Sealing* the *capias*.

(a) *Boyd v. Durand*, 2 Taunt. 161; but see *Hay v. Mann, Barnes*, 117; Tidd, 155.

(b) *Ante*, 221.

(c) *Id.*

(d) See the form in *Dunn v. Harding*, 10 Bing. 553; *ante*, 221.

(e) *Ante*, 222.

(f) *Ante*, 224.

(g) *Ante*, 229 to 233.

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generally sealed in anticipation, and even before it is signed or filled up, so that in fact the sealing affords no real evidence of authenticity. *(h)*

Eighth, Direction to serve only and not to arrest one or more of several defendants.

Eighthly, We have seen that the 2 W. 4, c. 39, s. 4, expressly provides, that the plaintiff or his attorney may order *the sheriff* or other officer to whom a writ of capias is directed to arrest one or more only of the defendants therein named, and to *serve* a copy of the capias on one or more of the others, and which order is to be obeyed by such sheriff or other officer, and the service is to be of the same force and effect as the service of a writ of summons. *(i)* When the plaintiff resolves to give such order, it may be advisable to subscribe the same on the writ, or indorse it, *(k)* and particularly to draw the attention of the *under-sheriff* and the *officer* to such qualification of the terms of the writ, so that the former may frame the warrant accordingly, and the officer take care to avoid arresting the favoured party. The order may be written on a separate paper, addressed to the sheriff, his under-sheriff, and his officers as subscribed, or may be more concise and indorsed on the writ. *(l)*

Ninth, Of concurrent original writ of capias into different counties, and proceedings on each.

Ninth, Though at first doubted it is now settled, that as well before as since the uniformity of process act, 2 W. 4, c. 39 a plaintiff may *at the same time* have two or more original or first writs of capias against one or more defendants, directed to the sheriffs of different counties, and *each of them framed as originals*, and not referring to each other, *(m)* (as alias and

(h) *Ante*, 224, 225.

(i) *Ante*, 151, in note.

(k) See the form of indorsement, *ante*, 208.

Form of order not to arrest, but to *serve* one of several defendants in a capias.*

(l) See also *ante*, 208.

* Pursuant to the stat. 2 W. 4, c. 39, s. 4, 1, the attorney for the said plaintiff, order and direct the said sheriff to arrest only C. D. and E. F. in the annexed writ mentioned, and not to arrest G. H. of, &c. also in that writ named, but to serve upon him a copy of the said writ, and all memoranda, warnings, notices, and indorsements, pursuant to the said statute.

Y. Z. of, &c. attorney for the said plaintiff.
To the sheriff of —, and his under-sheriffs,
and all officers of the said sheriff."

Or indorsed on the writ thus:—

" Arrest the within named C. D. and *only serve* the within named E. F. with a copy thereof.

Y. Z. of, &c. attorney for the said plaintiff."

The like by a short indorsement on writ, see also *ante*, 208.

(m) *Ante*, 216, 217.

* See the forms, Tidd's Forms; T. Chitty's Forms, 47.

pluries writs of capias must when issued under the rule of M. T. 3 W. 4,) (*n*) and in such case it suffices to leave and file the affidavit to hold to bail in the proper office of the county into which the first writ is issued; and it is not necessary to file or leave a copy of such affidavit with the filacer or other proper officer who signs the other writ or writs into the other counties, and it suffices if the præcipe for each of such other writs refer to the affidavit as filed in the proper office for signing the first writ, and to which all persons might have access. (*o*)

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We have sufficiently considered the requisites of an alias and pluries capias, and indorsements thereon. (*p*)

Alias and pluries Capias.

Tenth, When examining the proceedings on *concurrent* and alias and pluries writs of capias, we considered the necessity or at least the expediency of filing an office copy of the affidavit to hold to bail with the officer issuing the second or subsequent process. (*q*) It seems to be *requisite* to file the original affidavit at the proper office for signing the writ of capias for the county to the sheriff of which the *first* writ is directed; (*r*) and if another or other concurrent writs of capias be at the same time or afterwards issued into another county, no other affidavit or even any office copy of affidavit need be made; but it suffices in the præcipe for the second or subsequent process to refer to the original affidavit as filed in the office for the first county. (*s*) It may however be the safest course to file with the filacer, or other proper officer by whom any subsequent writ is signed or issued, an *office copy* of such original affidavit, to which the defendant might on search have access. (*t*) But it has been decided, that if a capias be issued into one county on an affidavit of debt, and no proceeding be taken on it, another original capias may be issued into another county on the same affidavit. (*u*) But in such case the præcipe for the writ secondly issued should refer to the affidavit first filed, so as to enable the defendant there to search for such affidavit. (*x*) And when an *alias* or *pluries* capias is issued into a different county, it seems advisable to file a *copy* of the original affidavit

Tenth, When more than one affidavit of debt or a copy must be filed.

(*n*) *Ante*, 217, 218; see rule, *ante*, 160, 161, in note.

(*o*) *Ante*, 217 to 220; *Dunn v. Harding*, 10 Bing. 553; overruling dictum in *Coppin v. Potter*, *id.* 445; and see the form of præcipe for the second capias, *id.* 553, and *ante*, 221, in note.

(*p*) *Ante*, 217 to 219.

(*q*) *Ante*, 219, 220.

(*r*) *Ante*, 219, 12 Geo. 1, c. 29.

(*s*) See form in *Dunn v. Harding*, 10 Bing. 553, *ante*, 221, in note.

(*t*) *Id.* 553.

(*u*) *Rodwell v. Chapman*, 1 Crompt. & M. 70; 1 Dowl. 634, S. C. and *Dunn v. Harding*, 10 Bing. 553.

(*x*) See form of præcipe in *Dunn v. Harding*, 10 Bing. 553, *ante*, 221, in note.

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with the officer who signs such continued process. (y) And it has even been supposed that in the case of such continued process there ought to be a *fresh affidavit* made and filed in each county, unless the same officer or his deputy act for both counties. (z) But it is settled, that where a capias has issued into one county, upon an affidavit filed with the proper officer for that county, an alias capias may be issued by continuance into another county on the same affidavit. (a) So it has been decided, that if a writ of capias be issued into one county on an affidavit of debt, and no proceeding be taken on it, the defendant may be arrested upon another *original* capias into another county on the same affidavit; (b) and a party may be *arrested a second time* on the same affidavit, where the first action has been discontinued and the second proceeding is with the same filacer. (c) But to avoid discussion the safest course is, when the arrest is to be in a different county to that into which the first process was issued, to file either a fresh affidavit or at least *a copy* of the first affidavit with each officer who signs any subsequent process, with a præcipe for the writ referring to the original affidavit as filed with the officer who signed the first process. (d) And after the lapse of twelve months or a year from the time of swearing the first affidavit, it seems at least prudent to file a *fresh* affidavit, for otherwise it might be objected that the defendant might be arrested under colour of the first affidavit, although circumstances had subsequently intervened to render such arrest improper. (e)

Eleventh, Of obtaining Warrant to arrest from office of the Undersheriff of the proper county and other proceedings thereon.

Eleventh, The principal writ on parchment may then be forwarded into the proper county, or now it may be taken to the office of the proper undersheriff in London, enjoined to be kept by every sheriff *within one mile of Temple Bar*, by 3 & 4 W. 4, c. 42, s. 20, (f) and the *sheriff's warrant* is to be there obtained from the undersheriff, directed to any bound officer the plaintiff's attorney may name (or even to a particular person named *pro hac vice*), though the latter is rarely advisable,

(y) *Per Tindal, C. J., in Dunn v. Harding*, 10 Bing. 555; *ante*, 219, note (y), 222, note (l).

(z) *Anderson v. Hayman*, cited in *Coppin Potter*, 10 Bing. 441.

(a) *Coppin v. Potter*, 10 Bing. 441; see the former practice in *K. B. Baker v. Allen*, 7 Bar. & Cres. 526; 1 Man. & Ryl. 232, S. C.; and in *C. P. Anderson v. Hayman*, 2 Moore, 192; 8 Taunt. 242, S. C.; *Dalton v. Barnes*, 1 Maule & S. 230; *Dorville v. Whoomwell*, 3 Bing. 39; *Evans v. Bidgood*, 4 Bing. 63; *Tidd*, 154, 180.

(b) *Rodwell v. Chapman*, 1 Crom. & M. 70; 1 Dowl. 634, S. C.; approved per *Tindal, C. J., in Dunn v. Harding*, 10 Bing. 556.

(c) *Richards v. Stuart*, 10 Bing. 322.

(d) See form of præcipe for capias in *Dunn v. Harding*, 10 Bing. 553; and the observation of *Tindal, C. J., id.* 555; and *ante*, 219, note (y), 221, note (l).

(e) *Collier v. Hague*, 2 Strn. 1270; *Crooks v. Holditch*, 1 Bos. & Pul. 176; *Tidd*, 9 ed. 190; *Burt v. Owen*, 1 Dowl. 691; 1 Arch. 108.

(f) *Ante*, 47.

because it may discharge the sheriff from liability for any escape, &c. (f) The writ on parchment in practice is now *filed in the undersheriff's office* and not delivered to the officer, although we have seen that it has been supposed that the officer should have the writ in his possession, to shew to the defendant if required. (g) A *copy* of the writ, with the memorandum, warnings and indorsement thereon, must however be delivered to the *officer*, who is thereupon to proceed without delay and with due diligence to arrest the defendant or defendants, first obtaining from the plaintiff's attorney a *full description* of the defendant and his residence and when and where he is likely to be found, so as to identify him and prevent the risk of arresting a wrong person. And amongst inferior persons sometimes the plaintiff himself accompanies the officer to see that he performs his duty.

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Twelfth, The *warrant* is usually under the *sheriff's seal* of office for the particular Court and is so pleaded. (i) It may be addressed to an ordinary officer of the sheriff, usually termed a *bound bailiff*, or to any person named by the plaintiff's attorney though not a regular officer, though the latter is not advisable. (j) unless named in conjunction with the regular officer, in order to see that the process is faithfully executed. The form of the warrant usually resembles that in the note, with the exception of an additional direction to the officer there suggested as *expedient* to be introduced. (k)

Twelfth, Form and requisites of Warrant. (h)

(f) *De Moranda v. Dunkin*, 4 Term Rep. 119.

(g) *Ante*, 267, note (o).

(h) See fully Tidd, 9 ed. 217; 1 Arch. K. B., 4 ed. 130.

(i) See form 3 Lev. 63; 1 Saund. 298, note 5. But it is not necessary though usual in a plea of justification of an arrest under mesne process to state that the

warrant was under seal, 2 Saund. 305, note 13; 1 Saund. 296. When it is necessary, see Com. Dig. Pleader, 3 M. 24; Willes, 411; Bul. Ni. Pri. 83.

(j) *De Moranda v. Dunkin and others*, 4 T. R. 119; *Hamilton v. Dalziel*, 2 Bla. R. 952; *Rex v. Sheriff of London*, 1 Chit. R. 613.

(k) Middlesex [the county &c. to the sheriff of which the writ is directed]. S. S. Esq. and J. S. Esq. sheriff of the county aforesaid: To B. B. and J. D. my bailiffs, greeting: By virtue of the king's writ issued out of his majesty's Court of K. B. [or C. P. or Exch. of Pleas], bearing date at Westminster, the — day of —, A. D. 1835, to me directed, I command you, each and every of you, jointly and severally, that you or any of you omit not by reason of any liberty in my bailiwick, but that you enter the same and take C. D. of &c. [describing the defendant as in the writ] if he shall be found in my bailiwick, and him safely keep until he shall have given me bail or made deposit with me according to law, in an action on promises [or of debt, &c. as the plea is described in the writ] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from my custody: And I do further command you and each and every of you, jointly and severally, that on execution hereof you do deliver to him the copy of the said writ herewith delivered to you. [It may be advisable here to insert the following direction: "And I command you immediately on the execution hereof, to request the said C. D. to nominate or appoint some safe and convenient dwelling-house in my bailiwick within three miles from the place of his arrest, not being his own dwelling-house, there to be kept and detained for and during the first twenty-four hours after his arrest, pursuant to the statute 32 Geo. 2, c. 28, s. 1."] And I do further command you or any of you, that you do within six days at the least, after execution of the said writ by service or arrest, inclusive, indorse on such

Form of a sheriff's warrant on a capias.

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As the sole object of a *warrant* is to give the *officer* proper directions what he is to do, (i. e. to arrest and detain the defendant, and to deliver to him a copy of the writ, and to certify to the sheriff what the officer has done,) and is not designed to give any information to the *defendant* himself, the circumstance of a warrant not stating the Court in which the process is returnable is immaterial. (m) Nor is a variance between the sheriff's warrant and a writ of *capias* or *capias ad satisfaciendum* so material as to induce the Court or a judge to discharge the defendant merely on that ground. (n) And in a recent case a very learned judge considered, that at least when a defendant is no longer in custody, he has no right to the inspection of the warrant. (o)

Thirteenth,
Delivery of war-
rant and writ
and copies to
the officer.

Thirteenth, At any time within four calendar months from the day of thus issuing a bailable *capias*, during which it continues in force, the plaintiff or his attorney may take the principal writ on parchment, when intended to be used, to the office of the under-sheriff of the county to whom it is addressed, and require the officer there to make out his proper warrant, which by some ancient rules and by statute must not

writ the true day of the execution thereof, and that immediately after the execution hereof you do certify to me the manner in which you shall have executed the same and the day of the execution hereof, so that I may return the same to his majesty's said Court, or if the same shall remain unexecuted then that you do so return this my warrant at the expiration of four calendar months from the day of the said writ or sooner if thereto required. Dated the — day of —, 1835.

(L. S.)*

Writ issued by P. S. of —,
plaintiff's attorney.

Oath for £— by affidavit [or by order
of the Honourable Mr. Justice —,
made on the — day of —, A. D.
1835.]

The plaintiff claims £— for debt and £— for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the caption or service of the copy of the said writ proceedings will be stayed. Before you arrest the defendants beware they are not privileged as ambassadors or servants to ambassadors, or otherwise privileged or protected. This warrant is allowed for one defendant and no more and to be executed by no bailiffs but those who have given the said sheriff security.

Memorandum subscribed to the above named writ.

This writ &c. [here copy the memoranda and warnings as in the writ].

(m) *Astley v. Goodyer*, 2 Dowl. 619.

(n) *Williams v. Lewis*, 1 Chitty's Rep. 611; *Boyd v. Durand*, 2 Taunt. 161, as to mesne process; same point as to a ca. sa., *Rose v. Tomblinson*, 3 Dowl. 49, 55.

(o) *Hartley v. Sell*, in Exchequer, 3d

January, 1835. Bosanquet, J. refused, on hearing a summons for that purpose, to make an order for inspecting and taking a copy of a warrant, in order to enable plaintiff to declare more securely against the officer for extortion upon the arrest.

be previously sealed; (p) and if it were, (p) or if the warrant were issued in blank, or if any alteration were introduced in the same after sealing, even the *homicide* of the officer, which would otherwise be *murder*, might amount only to *manslaughter*. (q) But it is as illegal as immoral to commit a *personal dangerous injury* to any person executing process, however irregular. (h)

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Fourteenth, Of the Arrest and incidents.

The subject of arrest may be considered under the following heads:—

Fourteen, Of the arrest and several incidents.

1. Consequences of arrest by a wrong name.
2. Place of arrest.
3. Time of arrest.
4. Of second arrests.
5. Of arrests and detainers when the defendant is already in custody of the sheriff.
6. Mode of arrest.
7. Duty of officer thereupon.

To deliver to defendant a copy of the writ.

To inform defendant of his right to be taken to the house of a friend for 24 hours.

Conduct of officer if defendant be ill.

Production to defendant of writ and warrant.

Duty to indorse on the writ the time of arrest.

1. We have pointed out the consequences of *misnomer* of a defendant, or of arresting him by *initial* or *omitted* Christian name. (r) If the defendant be neither named nor known by the name in the writ, he may, unless in the excepted cases, (s) if arrested, support an action of trespass for false imprisonment, (t) unless he pretended to be of the name stated in the writ, (u) or he may be discharged out of custody on motion. (v) The officer should therefore always distinctly ask the defendant if his Christian and surname are those mentioned in the writ and warrant; and if he admit that they are, then such admission would preclude him from insisting the contrary, or at least from supporting any action for the arrest. (x)

1. Consequences of arresting a defendant by a wrong name, or of arrest of a wrong person.

(p) *Ante*, 224, note (b); 6 G. 1, c. 31, s. 53; and see as to the sheriff's warrant in general, Tidd, 216, 217.

(q) See observations, *ante*, vol. i. 634 to 639; *Cole v. Hindson*, 6 T. R. 234, 236; *Housin v. Barrow*, *id.*; *Burstem v. Fern*, 2 Wils. 47; 1 East's P. C. 310.

(r) *Ante*, 165 to 174.

(s) *Ante* 166; and what is sufficient diligent inquiry, *Ladbrook v. Phillips*, 1 Har-

ison's Rep. 109.

(t) *Shadgett v. Clipson*, 3 East, 328; *Cole v. Hindson*, 6 T. R. 631; *Ladbrook v. Phillips*, 1 Harrison's Rep. 109.

(u) *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530.

(v) *Ladbrook v. Phillips*, 1 Harrison's Rep. 109.

(x) *Supra*, n. (u).

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If a *wrong person* be taken, who was clearly not the person intended by the process, he might support an action of trespass for illegal imprisonment under the writ, unless he, by knowingly and fraudulently pretending to be the party intended, either to enable the latter to escape or avoid arrest, in which case his misrepresentation might be pleaded either specially, (or perhaps even generally as a license to imprison,) as an excuse for imprisoning him, and would be a bar to the action, (x) and an action might be supported against him for his deceit, and thereby occasioning the escape of the other party, and even the whole debt and costs might be recovered from him. But care to arrest the right person must in general be observed, for if a wrong party should be arrested, and he perfect bail, and defend the action without collusion with the proper party, the plaintiff would be nonsuited. (y) At all events, before the uniformity of process act, 2 W. 4, c. 39, if the real defendant was described in a capias *against the person* or *distringas* by a *wrong* Christian or surname, and it was executed against him, an action of trespass was sustainable; and the Court of King's Bench would not, after an action of trespass had been commenced in respect of such misnomer, permit an amendment. (z) In cases where a defendant obtains his discharge from imprisonment on the ground of misnomer in the writ, it has been usual to require him not to bring any action, or at least if he refuse to submit to that condition, he will not be allowed the costs of the application.

2. Place of arrest.

2. The officer having received the copy or copies of the writ and his warrant, and keeping them at all times about his person ready to be instantly executed, must proceed to arrest the defendant (now without regard to any liberty or franchise, as every writ is in effect a non omittas under the 2 W. 4, 39,) at some place *actually* within the county; for if the arrest should be made in fact out of the proper county, an action of trespass for the imprisonment might be sustained, because there is not any exception as to the 200 yards distance beyond the exact boundary line, as in the case of mere serviceable process. (a) But we have seen that places, parcel of a county, but *wholly* situate within and surrounded by some

(x) The author so pleaded such misrepresentation to an action for false imprisonment tried on the western circuit, and the defendant obtained a verdict; and see *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530.

(y) *Wilde v. Keep*, 6 Car. & Payne,

235; and *ante*, 168, n. (k). *Aliter*, if the real party was arrested though misnamed, *Moody v. Aslat*, Exchequer, Hilary, 1835, 1 Harrison & Gale, 47.

(z) *Anon.* M. T. 41 G. 3, K.B.; Tidd, 9th ed. 161, n. (v).

(a) 2 W. 4, c. 39, s. 1.

other county, constitute an exception. (b) And though an action of trespass might be supported when an arrest has been indisputably made at a considerable distance out of the proper county, the Courts will not interfere to discharge a defendant on the ground that he has been arrested out of the proper county, unless it be sworn that place of arrest was not on the confines, and that there is not any dispute about the boundary. (c)

3. There is not now, as heretofore, the limit of any fixed return day, on or before which a writ of *capias* should be executed, though writs of *distringas* and process to outlawry must be returnable on a day certain in term. A *capias* is current for four months, and may be executed on any day excepting Sunday, (d) Christmas-day, (d) and Good Friday, (d) and at any hour of the night, excepting, as we have seen, Saturday night after the hour of twelve at night. (d)

3. Time of arrest.

4. If the defendant hath been discharged from custody under a *capias*, upon his giving a check on a banker afterwards dishonoured, or on an undertaking not afterwards performed, he may be arrested a *second time* upon the same writ and warrant, and without any fresh affidavit. (e) But in general we have seen that the rule of II. T. 2 W. 4, directs that after non pros. nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

4. Second arrest.

5. When a defendant is already in custody in the prison of the Court of King's Bench or Common Pleas or Exchequer, viz. in the *King's Bench* or *Fleet Prison*, the 2 W. 4, c. 39, s. 8, prescribes a particular form of *writ of detainer* at the suit of a third person, to continue the defendant in the same prison at his suit, and which proceeding will be considered in the following chapter; but when a defendant is in the custody of a *sheriff* or other officer having the execution and re-

5. Arrest of defendant whilst already in custody of the sheriff on a prior writ, and herein of *detainers* on subsequent process.

(b) 2 W. 4, c. 39, s. 20. In a case of that nature in T. Chit. Forms, 2d ed. 40, n. (b), it is suggested that the *capias* should command that the sheriff "take C. D. if he be found in your bailiwick, or within any district or place which is wholly situate within and surrounded by the said county of —;" or if the writ be directed to the sheriff of the surrounding county, then the writ may be, "within any district or place which is wholly situate within and surrounded by your county;" and see concluding part of

2 W. 4, c. 39, s. 20, which seems to require such express directions in the body of the writ in such cases; and see form, ante, 342, n. (3).

(c) *Webber v. Manning*, 1 Dowl. 24; *Hammond v. Taylor*, 3 Barn. & Ald 408; *Tidd*, 218, 219.

(d) *Ante*, 110.

(e) *Puckford v. Maxwell*, 6 T. R. 52; 1 Chit. Rep. 274, n.; *Cantelow v. Freeman*, 3 Tyr. 579; 1 Crompt. & Mee, 536, S. C.

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turn of mesne process, then he is to be proceeded against in *bailable* cases by the same process, viz. *capias*, as if he were at large; and the delivery of a *capias* to the under-sheriff of the county in which such defendant is already a *prisoner*, has immediately the same effect as if the sheriff had issued his warrant, and his officer had actually made a fresh arrest at the instance of such fresh plaintiff, and so as to subject the sheriff to an action for an escape, if inadvertently the defendant should be discharged from the first arrest, and suffered to go at large, instead of being continually *detained* on the fresh writ. (f) And this liability gave rise to the necessity for a sheriff's officer searching the office of the under-sheriff, to ascertain whether any fresh process has been lodged or brought in immediately before he discharges the defendant either on a bail-bond or deposit of the sum sworn to, and £10 for costs.

But before a sheriff's officer ventures to detain a party upon fresh process, he must consider whether the first arrest was legal; for if it were illegal, and attributable to the *misconduct of the sheriff, under-sheriff, or any officer of the former* in making the first arrest, or occasioned by the wrongful contrivance of the *same plaintiff*, then any subsequent process, even at the instance of a third person proceeding without collusion, would be illegal and inoperative; as where an assistant, in the absence of the officer named in the warrant, illegally arrested a party on mesne process, and a *ca. s. r.* at the suit of *another person* was lodged in the office whilst the defendant was so illegally in custody, the Court discharged the defendant. (g) So if the *same plaintiff*, who has arrested and caused a defendant to be detained on irregular process, (afterwards set aside,) issues and at the same time detains the defendant on regular process, the defendant will be entitled to be discharged from both. So if the second process were even issued by a *third person in collusion* with the plaintiff in the first irregular process, the same consequence would ensue. But where the only objection to the first affidavit or process, or arrest, is, that it *was irregular*, and neither the sheriff nor his officer have been to blame, then a *third person's* regular process would entitle *him* to *detain* the defendant at his suit, though he be discharged from custody under the first. (h)

(f) *Jackson v. Humphreys*, 1 Salk. 273; *Taylor v. Brander*, 1 Esp. Rep. 45; and post, 360, 361.

(g) *Barratt v. Price*, 9 Bing. 566; 1 Dowl. 725; 1 New Rep. 133; Bagl. Pr. 121.

(h) *Davis v. Chippendale*, 2 Bos. & Pul. 282, 367; *Barclay v. Faber*, 2 Barn. & Ald. 743; and observations in *Barratt v. Price*, 9 Bing. 566; 1 Dowl. 725; see further 1 Arch. K. B. 4th ed. 140, 141.

6. It was formerly supposed that in making an arrest the officer must actually seize or touch the person of the defendant, *(i)* but it now suffices if the officer named in the warrant be actually close to the defendant, and declares his purpose, and the defendant submits and conducts himself as if in custody, especially if they be in the same room and the officer lock the door. *(k)* And it is not necessary that the officer who has the authority should be the very hand that arrests, nor in the actual presence or view of the person arrested, nor actually in sight, nor is any exact distance prescribed, for it is sufficient if he be near and acting in the arrest. *(l)* But if without even seeing the officer the defendant, with sureties, executes a bail-bond, and sends it to the officer, although the obligors will be estopped from insisting that there was no arrest, an action on the bail-bond, yet these circumstances would not afford sufficient evidence of an *arrest* to support an action for *maliciously arresting* the defendant; though perhaps the facts might support a declaration differently framed for maliciously issuing the bailable writ, and occasioning the trouble and expense of executing a bail-bond, and putting in bail above. *(m)* So where in consideration of the officer not arresting the defendant, an attorney gave his undertaking to give a bail-bond, which was accordingly given, the Court considered that they could not give the defendant his costs under the 43 G. 3, c. 46, s. 3, because the defendant had not been "*arrested and held to bail*" within the terms of that act. *(n)*

It is clearly illegal for an officer after an arrest on civil process to handcuff or manacle the defendant, unless he has been clearly guilty of an attempt to escape or rescue himself. *(o)*

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6. *Mode of Arresting, and what amounts to the same.*

No right to handcuff a party.

7. *Immediately or forthwith* after the arrest, it is the duty of the officer, under the 2 W. 4, c. 39, s. 1, to cause one copy of the capias, with every memorandum or notice subscribed thereto, and all indorsements thereon, to be delivered to every defendant, *(p)* and if this be omitted, or if an insufficient copy be delivered, the Court or a judge, we have seen, would discharge the defendant out of custody, nor would an amendment of the copy be permitted. *(p)*

7. Duty of officer after arrest to deliver to defendant a copy of writ.

(i) 1 Salk. 79; 1 Ry. & Moody, 26; 1 Car. & Payne, 153, S.C.; Tidd, 9th ed. 219.

(k) *Id.*; Cas. Temp. Hardw. 301; 2 New Rep. 211.

(l) Cowp. 65; Tidd, 219.

(m) *Berry v. Adamson*, 6 B. & C. 528, cited in *Bates v. Pilling*, 4 Tyr. 232;

Amor v. Blofield, 9 Bing. 91; *ante*, vol. i. 48.

(n) *Bates v. Pilling*, 4 Tyr. 231.

(o) *Ante*, vol. i. 633, n. (2); *Wright v. Court*, 4 B. & C. 596; 6 D. & R. 623, S.C.

(p) *Ante*, 242, 243; *Byfield v. Street*, 10 Bing. 27; *Bagley's Prac.* 121.

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To inform defendant that he may go to the house of a friend for 24 hours.

Conduct in case the defendant be ill.

Production of the warrant to defendant.

It is the imperative duty of the arresting officer, in pursuance of 32 G. 2, c. 28, s. 1 & 12, (g) *immediately* after the arrest, to *inform the defendant* that he is at liberty to be taken to any safe and convenient house of any third person nominated by him within three miles, and in the county where the arrest took place, *not being the defendant's own residence*, there to remain for twenty-four hours, and that he cannot legally be taken to any gaol or prison, or into any tavern, ale-house, or victualling-house, or drinking-house, or to the private house of the officer until after that time; and if the officer should neglect to do so, and within twenty-four hours attempt to take the defendant to prison, he and the principal returning officer incur the forfeiture of £50 to the party aggrieved. (r)

If the party arrested be so ill as to render it dangerous to remove him, the officer may and ought unquestionably to abstain from removing him, and may permit him to remain even in his own house, in the custody of a follower, though not named in the warrant, he keeping the key of the house in his possession; and it suffices for the officer to remove the party as soon as he is sufficiently recovered; (s) and the sheriff, if ruled or required, may return languidus in the form already stated. (t) If the officer be doubtful upon the state of health of the party, he should require the attendance and advice of some respectable medical attendant, and require him, at the peril of the consequences of misrepresentation, to certify in writing whether it be fit to remove the party, or take him to any prison within the county. (u)

If the defendant should require the production of the writ itself on parchment, it was formerly supposed to be the duty of the officer to produce the same; (x) but this was not necessary unless expressly required by the defendant. (y) And now we have seen that the practice is to file the principal *writ* in the sheriff's office, and only a copy is delivered or shewn to the defendant. (z) It is however expedient to demand inspection of the warrant so as to ascertain that the person making the arrest is an officer named in the warrant, and not a mere

(g) See statutes and notes, Chit. Col. Stat. 53, 335.

(r) *Dewhurst v. Pearson*, 1 Crompt. & M. 365; 3 Tyr. 242, S. C.; *Simpson v. Benton*, 2 Nev. & Man. 52; *id.* 5 Barn. & Adol. 35, overruling *P. M. v. Sheriff of Middlesex*, 4 Moore & P. 726; 1 Dowl. 201; and see *Summers v. Moseley*, 2 Crompt. & M. 417.

(s) *Stevens v. Jackson*, 6 Taunt. 106; 1 Marsh. 496, S. C.; and see *Perkins v. Meacher*, 1 Dowl. 21; *Baker v. Davenport*, 8 Dowl. & Ry. 606; *Cavenach v. Collet*,

4 Bar. & Ald. 279.

(t) See the form, *ante*, 249.

(u) Per Lord Ellenborough, Mich. T. 1816.

(x) As to *serviceable process*, see *ante*, 250, 274, n. (l); and Tidd, 168, 169; *Worley v. Glover*, 2 Stra. 877; *Panchard v. Woolley*, Barnes, 302; *Boswell v. Roberts*, *id.* 422; *Westley v. Jones*, 5 Moore, 162.

(y) *Edgar v. Farmer*, Cas. Temp. Hardw. 138.

(z) *Ante*, 351.

assistant, illegally making the arrest in the absence of the officer. (2) Before the uniformity of process act, 2 W. 4, c. 39, and which seems to introduce no difference in this respect, where the defendant, at the time he was served with a copy of process, or even a quarter of an hour after, demanded to see the original, which was refused, the service was deemed irregular. (a) A fortiori, in bailable process, where a party is to be deprived of his liberty, it should seem but reasonable that the defendant should be afforded, on request, an inspection of the writ itself at the office of the under-sheriff, though as now he is to have an exact copy, perhaps the Court would not discharge him from the arrest on account merely of the refusal to produce the principal writ. It should seem at all events but reasonable that the officer should, on demand, produce his *warrant* to satisfy the defendant that authority to arrest him has been duly delegated to him by the sheriff, and connect him with the writ; though we have seen that after the defendant has been released from the imprisonment, a judge will not order the inspection. (b)

It is the duty of the sheriff or his officer, within six days inclusive after the arrest, to indorse on the *writ* the true day of the execution thereof, i. e. arrest of the defendant whom he may have arrested, and service of the copy delivered to one of several defendants whom he has been ordered only to serve; and in default thereof, the sheriff or other officer is to be liable in a summary way, to make compensation for any damage that may have resulted from the neglect. (c)

Duty to indorse
time of arrest,
&c.

Fifteen, Of Extortion on Arrests.—The statute 23 Hen. 6, c. 9, in express terms prohibits a sheriff or his bailiff, or other officer, having the execution of bailable process, from taking more than *fourpence* for making an arrest or attachment, or more than the like sum for making a bail-bond, warrant, or precept, under pain of forfeiting to “the party indamaged or grieved” his treble damages, and which is recoverable by action of debt, and £40 penalty, recoverable by a common informer in an action of debt, half for the king, and half for himself. (d) The 32 G. 2, c. 28, s. 1, (e) repeats the prohibition against taking or demanding for any arrest, or taking more than is by

*Fifteen, Extor-
tion on arrests.*

(2) As in *Barrett v. Price*, 1 Dowl. 725; and see a reason why a defendant ought to be allowed to see the warrant, 3 T. R. 187; Bagley's Prac, 121.

(a) *Thomas v. Pearce*, 2 Bar. & Cres. 761; 4 Dowl. & R. 317, S. C.; *Westley v. Jones*, 5 Moore, 162; Tidd, 169, 267, (a), 351.

(b) *Supra*, n. (2).

(c) 2 W. 4, c. 39, s. 4, Rule 4, Mich. T. 3 W. 4, ante, 151, and in note, 160, in note, 243, 244; and see form of indorsement on capias, ante, 244, note (g).

(d) See 23 Hen. 6, c. 9; Chitty's Col. Stat. 57; *Martin v. Bell*, 6 Maule & Sel. 220.

(e) See 32 G. 2, c. 28, s. 1; see Chitty's Col. Stat. 53, 335.

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law allowed, and for such taking the 12th section in effect entitles the party aggrieved to recover in an action of debt the cumulative forfeiture of £50, and treble costs, for taking more than the allowed sum of fourpence for an arrest. The act also prohibits *other* extortions, but in consequence of no table of fees having been settled by the Courts at Westminster, the latter act is not so extensively useful as it might be. (f) Although it is *usual in practice*, even in taxing costs, to allow a larger fee to the officer for the caption, viz. 10s. 6d. in London, and a guinea when the arrest has been made in the country, yet if the officer receive the same from the *party arrested*, he will still be liable to the above-mentioned penalties. (g) There are numerous other provisions for the prevention of extortion *after* the defendant has been taken to a lock-up house, and whilst there, (h) and which not only give the party aggrieved an action for £50, but also provide a summary remedy by application to the Court in which the process is returnable against the officer; (i) and excessive charges for an arrest or bail-bond are recoverable back from the officer by motion and reference to the master. (k) *But the application must be made within a reasonable time, or the delay accounted for by affidavit. (l)

Sixteen, Duty of officer to search for other writs before discharging the defendant.

Sixteen, Officer's duty to search.—The officer having thus arrested the defendant, is not, it should seem, bound to discharge him at the very instant, even upon tender of a bail-bond, or tender or deposit of the debt sworn to, and £10 for costs, under the statute 43 G. 3, c. 46. (m) But the sheriff's officer may and ought, *first*, though with the utmost expedition, (though twenty-four hours under circumstances were held not an unreasonable time, (n)) to search the office, so as to ascertain whether there may not have been delivered at the sheriff's office another bailable writ, or *capias ad satisfaci-*

(f) See *Boldero v. Mosse*, 3 Term Rep. 417; *Jaques v. Whitcomb*, 1 Esp. Rep. 361; *Martin v. Slade*, 2 New Rep. 59; *Martin v. Bell*, 6 Maule & Sel. 200; *Ex parte Evans*, 2 Bos. & P. 86.

(g) *Dew v. Parsons*, 2 Bar. & Ald. 562; 1 Chitty's Rep. 295, 302, S. C.; *Savage v. Smith*, 2 Bla. Rep. 1101. In *Townsend v. Carpenter*, 2 Car. & Payne, 118, it was held that a sheriff's officer may claim a guinea or half-a-guinea against the plaintiff's attorney for a caption; and see Bills of Costs, page 7. But if received from a defendant, the Court will on motion compel the officer to refund, *Watson v.*

Edmonds, 4 Price's Rep. 309.

(h) See fully 32 G. 2, c. 28.

(i) *Ex parte Evans*, 2 Bos. & Pul. 88.

(k) *Watson v. Edmonds*, 4 Price, 309; *Pitt v. Coombs*, 1 Harrison's Term Rep. 13; *In re the Sheriff of Northamptonshire*, January, 1835. K. B. when Mr. Erle obtained a rule against the sheriff for charging 7s. for a warrant on a *capias* which the master had reduced to 4s., but the legal demand was only 4d.

(l) *Pitt v. Coombs*, 1 Harrison's Rep. 13.

(m) *Taylor v. Brander*, 1 Esp. Rep. 45.

dum, and which if not searched for immediately before the actual discharge, would subject the sheriff to an action for an escape. (n) To avoid this temporary detention pending the search, and the risk of other process coming into the office, it is advisable for a defendant to anticipate and prevent actual arrest by prevailing on some attorney to induce the plaintiff's attorney to accept his undertaking to perfect bail above, or by having prepared and sending to the officer a satisfactory bail-bond, with proper fees, and which may be legally taken without any actual arrest. (o)

Seventeen, Conduct of Defendant on Arrest.—The defendant may, immediately after the arrest, demand the delivery to him of a copy of the writ and an inspection of the warrant, (p) and then insist on being taken to a proper private house of a friend, within three miles, for the first twenty-four hours. (q) If the process were regular, or only irregular and not void, it would be indictable to escape or rescue the party. (r) But if the defendant find that the writ or warrant is so defective as to be absolutely void, and not merely irregular, he may then in strictness legally resist or escape; (s) but it is rarely advisable even to attempt to do so; (t) and he must always *carefully* abstain from using a dangerous weapon, or committing any personal injury to the officer or his follower beyond a mere struggle to escape, for if death were to ensue, however illegal the warrant, he might be indicted for manslaughter and transported for life; as where the defendant deliberately shot at and killed the officer whilst illegally breaking an outer door to effect a caption. (u) And if the process should turn out regular, an escape or self rescue is an indictable offence at common law, as it is the duty of every one to submit to regular process. (x) The safest course is to submit under protest, and apply immediately to a judge, or by habeas corpus, and the judge will forthwith discharge the party, if the affidavit or process be illegal, or the defendant were in any respect privileged. (y)

Seventeen, The proper conduct of a defendant on his arrest.

(n) *Jackson v. Humphreys*, 1 Salk. 273; *Taylor v. Brander*, 1 Esp. Rep. 45. *Scoble*, the sheriff incurs some risk in a large county of a writ coming into his office either in the country or in London, between the time of search and discharge, and which should be provided against.

(o) 2 Saund. Rep. 59 l. post, 365, note (m).

(p) *Ante*, 359.

(q) *Ante*, 357, 358.

(r) *Ante*, vol. i. 633, &c.

(s) *Ante*, vol. i. 633, 635, 636; *R. v. Osmer*, 5 East, 304.

(t) *Ante*, vol. i. 638.

(u) *R. v. Nestor*, and other cases, *ante*, vol. i. 634 to 639.

(x) *R. v. Osmer*, 5 East's R. 304.

(y) *Ante*, vol. i. 694, 695

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*Eighteen, The
several legal
modes of de-
fendant's ob-
taining his re-
lease from im-
prisonment.*

Eighteen, The Legal Modes of obtaining Release from Imprisonment.—A defendant having been arrested, and received a copy of the writ, and finding that *prima facie* at least the arrest is legal *in form*, may adopt one of the following means of obtaining release from imprisonment:—1st, he may, under 43 G. 3, c. 46, sect. 2, immediately *deposit* the sum sworn to, and £10 to cover the costs, in the hands of the sheriff, by delivering the same to him or his under-sheriff, *or other officer to be by him appointed*, (usually the officer named in the warrant); 2nd, by executing a *bail bond* with *two* sureties; or, 3dly, by applying to an attorney and prevailing on him to give his *written undertaking* to the plaintiff's attorney that bail above shall be put in and perfected, which, if accepted, in general, occasions an immediate discharge on payment of the officer's fee. The last proceeding, when an attorney is at hand, and has confidence in the defendant, and the plaintiff's attorney will accept his undertaking, is the most summary and convenient, when no advantage of an irregularity is intended to be taken. But if the defendant have the money at command, the first measure may be the best; because, if the proceedings should turn out to be irregular, the defendant may then, immediately after the deposit, and within four days if possible, but at all events within eight days, take out a summons or move the Court to set aside the writ, or copy, or arrest; and if he succeed, he may then have back the money from the sheriff; and if the proceeding has been regular, and he resolves within a few days after arrest to settle the action, he might require the sheriff to pay the indorsed claim to the plaintiff's attorney, and thereby avoid further costs; and within the four days give the plaintiff's attorney a written notice to that effect, accompanied with a written order on the sheriff for the amount. (z) When the defendant's attorney gave notice to the plaintiff's attorney of the payment to the sheriff, and that he should not defend the action, but reclaim only the surplus which remained, after payment of the debt and costs, and the plaintiff's attorney, on the sheriff omitting after request to remit the money, proceeded in the action, the Court held that the defendant was not liable to pay the costs incurred after the arrest. (a)

If a sheriff's officer discover that the arrest is illegal, either

(z) *Semble.*

(a) Tidd, 229; *Clarke v. Yates*, 3 Brod. & B. 273; 7 Moore, 83, S. C.; but see *Ogley v. Weaver*, 7 Moore, 557,

and note the first decisions were before 2 W. 4, c. 39, and rules Mich. T. 3 W. 4.

on account of such a material defect in the writ, or on account of privilege, &c. so that any continued detention would only increase the damages in an action for false imprisonment, then he may instantly discharge the party arrested, though it might be advisable first to obtain the order of the Court or a judge. But if the arrest was legal, or the writ merely irregular, then the officer cannot safely discharge the defendant without first ascertaining that the defendant has executed a proper bail bond, or deposited the sum sworn to and £10 for costs, or that the plaintiff's attorney has accepted the undertaking of the defendant's attorney; and in the latter case it would be prudent to require the *written authority* of the plaintiff's attorney for the discharge. If after an arrest the defendant be suffered to go at large without a previous bail bond with *two* sureties, the sheriff might perhaps be fixed with personal liability by the immediate commencement of an action for the escape, against which the Court would not afterwards relieve the sheriff. (b)

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Consequences
of discharging a
defendant with-
out requiring
one of these.

Nineteen, Of the Bail Bond.—The most usual proceeding after an arrest, is for the defendant and two other persons, as his sureties, to execute a *bail bond* (c) conditioned in express terms "*for his causing special bail to be put in* for him in a named Court, as required by the writ of *capias* previously recited (i.e. *in effect* not only for putting in such bail within eight days after the arrest, but also giving due notice thereof, and if excepted to causing such bail to swear to their sufficiency.) Sheriffs were required to accept the security of a bail bond by the statute 23 Hen. 6, c. 9, and that enactment still applies, although the terms of a bail bond have necessarily been altered since the introduction of the new form of a writ of *capias* in lieu of the former writs; and if a sheriff should refuse to accept a bond framed according to the requisites of 23 Hen. 6, c. 9, as varied by 2 W. 4, c. 30, viz. a bail bond executed by the defendant, with *two* sureties having sufficient in the county, but not otherwise, (d) (a requisite prescribed in order that the sheriff might be the better enabled to ascertain the sufficiency of the tendered sureties,) he would be liable to an action of debt by an informer, to recover £40 penalty, and also to a special action on the case, at the suit of the party aggrieved, to recover

*Nineteen, Of
executing a
Bail Bond.*

(b) *Fuller v. Prest*, 7 Term R. 109; *Pariente v. Phumbtree*, 2 Bos. & Pul. 35; *Allingham v. Flower*, *id.* 246; *Birn v. Bond*, 6 Taunt. 554; *How v. Lacy*, 1 Taunt. 119.

(c) See form in *Evans v. Mosley*, 4 Tyr. 170; 2 Crom. & M. 490, and in note, *infra*.

(d) *Lovell v. Plomer*, 15 East, 320; *Matson v. Booth*, 5 Maule & S. 223.

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treble damages for any subsequent imprisonment, both of which actions are given by the 23 Hen. 6, c. 9. (e) The form of bail bond now adopted is given in the note. (f) Such bond is usually dated of the day of the arrest, though executed on a subsequent day; (g) and the condition recites the arrest of the defendant on the very day when it took place under the writ of capias shortly recited, and that a copy of the writ, with all the memoranda, notices and indorsements thereon, had been delivered to the defendant; and then follows the condition for the defendant's putting in bail in the proper Court, as required by such recited writ; (g) but as no express alteration in the terms of a bail bond has been introduced by 2 W. 4, c. 39, it would seem questionable whether a defendant is bound to execute a bail bond conditioned for more than the putting in bail above within eight days after the arrest inclusive, omitting the recital of his having received a copy of the writ, memorandum, notices and indorsements, the admission of which might prejudice him in insisting that no such *copy* had been delivered to him.

It has been decided that an attorney ought not to prepare a bail bond in a larger penalty than is requisite according to the

(e) *Evans v. Moseley*, 4 Tyr. 169; 2 Crom. & M. 490, S. C.

The form of a
Bail Bond.

(f) Know all men by these presents, that we C. D. [the defendant arrested,] of —, E. F. of —, and G. H. of —, are held and firmly bound to S. S. Esq. sheriff of the county of —, in the sum of [double the sum sworn to and indorsed on the writ], of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and each of us for himself in the whole, our and every of our heirs, executors and administrators, firmly by these presents sealed with our seals. Dated the — day of —, in the year of our Lord, 1835.

Whereas the above bounden C. D. was, on the — day of — instant, taken by the said sheriff, in the bailiwick of the said sheriff, by virtue of the king's writ of capias issued out of his majesty's Court of King's Bench, [or C. P. or Exch. of Pleas,] bearing date at Westminster, the — day of —, to the said sheriff directed and delivered against the said C. D. [and J. K. &c. as in the writ,] in an action on promises, [or of debt, &c. as in the writ,] at the suit of A. B. [And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon was, on the execution thereof, delivered to the said C. D.] And whereas the said C. D. was and is, by the said writ, required to cause special bail to be put in for him in the said Court to the said action, within eight days after the execution thereof on him, inclusive of the day of such execution. Now the condition of this obligation is such, that if the said C. D. do cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then this present obligation will be void and of no force, otherwise to stand and remain in full force, vigour and effect.

Sealed and delivered in the presence of W. W.

C. D. (L. s.)
E. F. (L. s.)
G. H. (L. s.)

(g) *Evans v. Moseley*, 4 Tyr. 171; 2 Crom. & M. 490, S. C.

practice of the Court. (*h*) And it may be important to observe this injunction, because otherwise the bail to the sheriff might be exposed to greater liability than the affidavit to hold to bail had required. (*h*) Although a bail bond with *one* surety is not invalid, (*i*) and the sheriff cannot be sued directly for taking only one, (*k*) yet as the statute implies a duty to take *two* sureties for the greater security of the plaintiff, if he take only one, and an attachment be obtained against the sheriff, the Court will not set aside the same at his instance, though they might on the application of the bail above. (*l*) A defendant should not *voluntarily* execute a bail bond without a previous arrest, without first ascertaining that the affidavit to hold to bail is sufficient, because he would thereby be precluded from afterwards objecting to such affidavit. (*m*)

A bail bond having been taken, care must be observed by the plaintiff and his attorney not to grant any binding indulgence to the defendant himself as to time or otherwise, that might, on the ordinary principle of principal and surety, discharge the latter. (*n*) At all events more time should not be given to a defendant than the ordinary course of a suit would occupy, unless the bail, *or one of them*, expressly concur; and it is advisable to require them to sign their *written* consent, reciting that the indulgence is to be at their request, and that the same shall not prejudice. Indeed this precaution equally extends to bail above. But if one of the bail to the sheriff consent to time being given to the defendant to perfect bail above, his act is binding upon both. (*o*) And it has been considered, that after a bail bond has been forfeited, and an assignment thereof taken, then time subsequently given to the principal would not discharge the sureties. (*p*)

Consequences of indulgences to principal, discharging sureties.

It is the duty of the sureties, executing the bail bond, to take care that the defendant *puts in bail above within the eight days* allowed for that purpose *at all times of the year*; and even without the consent of the defendant they may put in and

(*h*) *Wingrave v. Godmond*, 6 Car. & P. 66.

(*i*) *R. v. Sheriffs of London*, 9 Moore, 422; 2 Bing. 227, S. C.; *Beaufage's case*, 10 Coke, 100 b; *Austen v. Howard*, 7 Taunt. 28, 327.

(*k*) *Clifton v. Webb*, Cro. Eliz. 808; Tidd, 223.

(*l*) *R. v. Sheriff of Middlesex*, 2 Dowl. 140; *R. v. Sheriffs of London*, 9 Moore, 442; 2 Bing. 227, S. C.

(*m*) *Norton v. Danvers*, 7 Term Rep.

375.

(*n*) *Thomas v. Young*, 15 East, 417; *Farmer v. Thortey*, 4 Bar. & Ald. 91; Tidd, 295, 301, 305.

(*o*) *Howard v. Bradberry*, 3 Dowl. 92.

(*p*) *Woosnam v. Price*, Crompt. & M. 352; 3 Tyr. 373, S. C.; *Lee v. Levi*, 4 Bar. & Cres. 390; 1 Car. & P. 553, S. C.; *Pike v. Sweet*, 1 Daus. & Lloyd, 159, *sed quare*. See Chitty on Bills, 8th ed. 448.

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justify bail above for their protection, though, to prevent an adverse render by bail above, put in by the bail below or bail to the sheriff, the defendant himself may, at the same time, put in and justify bail above, and in that case the Court will direct that the rule for the allowance of the bail put in by the defendant himself only shall be drawn up, and the other stand ; for otherwise, however sufficient the persons who had become bail above, as *friends* of a defendant, might be, other bail put in by the sheriff, or bail below for their indemnity, might render and subject the defendant to imprisonment, at least for a time. (q)

Twenty, Of a deposit with sheriff, &c. of the sum sworn to, and 10*l.* for costs under 43 G. 3, c. 46, s. 2. (r)

Twenty, Déposit in lieu of a Bail Bond.—The 43 G. 3, c. 46, s. 2, (singularly, not noticed in any of the forms prescribed by the 2 W. 4, c. 39, but by mistake the 7 & 8 G. 4, c. 71, is there referred to in lieu of that act,) (s) authorizes the party arrested, in lieu of giving bail to the sheriff, to deposit in the hands of the *sheriff*, by delivering to him or to his undersheriff, or other officer to be appointed for that purpose, (t) (usually the officer named in the warrant,) *the sum indorsed on the writ by virtue of the affidavit for holding to bail in that action, together with 10*l.* in addition, to answer the costs up to and at the time of the return of such writ*, and thereupon the sheriff is to discharge him. Such payment may be accompanied with the subscribed notice. (u) The sheriff is, within eight days after the arrest, to pay the sum thus deposited to the same officer who signed the writ, and if the defendant should afterwards in due time perfect bail above, he is, on motion to the Court in

(q) *Wheller v. Rankin*, 1 Chit. Rep. 81 ; *R. v. Sheriff of London*, id. 329 ; *Taylor v. Evans*, 1 Bing. 367.

(r) Tidd, 9 edit. 227 ; 1 Arch. K. B. 4 ed. 145.

(s) The 2 W. 4, c. 39, schedule No. 4, only refers to 7 & 8 G. 4, c. 71, evidently by mistake inserted for 43 G. 3, c. 46.

(t) Therefore not to the arresting officer, unless expressly authorized.

(u) In the King's Bench.

{ A. B. plaintiff,
and
C. D. defendant.

Take notice, that I have this day deposited with you the sum of 57*l.* viz. 47*l.* for the debt sworn to, and 10*l.* for costs, in lieu of bail to this action, and pursuant to the statute, and that the same is deposited with you without prejudice to the right of the said defendant to object to any irregularity in the affidavit to hold to bail, writ or other proceeding, or to an action against the sheriff of Middlesex, his officers, and all other persons concerned in holding him in custody in this action, or his taking any other proceedings he may be advised. Dated this — day of —, A. D. 1835.

To the sheriff of Middlesex,
his under-sheriff and officers,
to A. B. the plaintiff, and G. H.
his attorney, and to whom else
it may concern.

Your's &c.

F. F. attorney for the said defendant.

banc, (but not on an application to a single judge) to have the money back. (x)

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Proceedings
after deposit of
debt and 10*l.*
for costs.

If a defendant has deposited money in the hands of the sheriff, and which has also been paid into Court, then if he put in bail according to the exigency of the capias in *due time*, he may have the money out of Court, but if he do not put in bail above in due time, he will not be allowed to take the money out, although the capias did not mention such a deposit in the warning subscribed to the writ. In case, however, bail above be afterwards perfected before the plaintiff has taken the money out of the Court though not in due time, then the plaintiff will be put to his election, and cannot retain the security of the bail as well as the money. (y)

Twenty-one, Payment of the further sum of £10 for Costs in lieu of Bail above.—Under the 7 & 8 G. 4, c. 71, the defendant, in lieu of perfecting bail above, may pay into Court the further sum of £10 (*i. e.* altogether 20*l.* for costs) towards the costs, and which, with the sums deposited with the sheriff, are then to remain in Court in lieu of bail above. (z)

Twenty-one, Payment into Court in lieu of bail above of a further sum of £10 in addition to the £10 and the debt sworn to, deposited with sheriff.

Twenty-two, Attorney's Undertaking.—Sometimes, when an attorney has confidence in his client, he will give his undertaking for the defendant's putting in and perfecting bail above to the plaintiff's attorney, and thereby save the client from the annoyance of an arrest, and the expense and trouble of a bail bond or deposit; but to avoid personal responsibility, most attorneys decline to incur such liability, and their articles of co-partnership frequently expressly prohibit the same. As the 23 Hen. 6, only affects securities to the sheriff, engagements of this nature are not within that act, when given to the plaintiff or his attorney, though it would be otherwise if given to the sheriff or his officer; (b) and even a verbal undertaking to sign a bail bond for the defendant is not deemed an undertaking to answer for the debt, default, or miscarriage of a third person within the meaning of the 29 Car. 2, c. 3, s. 4, and therefore need not be in writing to sustain an action. (c) The Court, however, it has been supposed, will not enforce by *attachment* an attorney's undertaking to appear or put in or perfect bail

Twenty-two, Undertaking by defendant's attorney to put in bail in lieu of bail bond. (a)

(x) *Geach v. Coppin*, 3 Dowl. 75; 43 G. 3, c. 46, s. 2.

(y) *Geach v. Coppin*, 3 Dowl. 74.

(z) 7 & 8 G. 4, c. 71, s. 2.

(a) As to an attorney's undertaking to put in bail in general, see Tidd, 9 ed.

227, ante, 240, 273.

(b) *Sedgworth v. Spicer*, 4 East, 568; *Lewis v. Knight*, 8 Bing, 271; 1 Moore & S. 353.

(c) *Jarmain v. Algar*, 2 Car. & P. 249, R. & M. 343, S. C.

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*Twenty-three,
Change of
officer.*

above, unless it be in writing and signed by him. (d) It may be expedient to adopt the subscribed form. (c)

Twenty-three, Change of Officer.—There is also another mode of accommodating a defendant who has been arrested, not unfrequently practised; viz. by the defendant's attorney getting the sheriff's officer, whom he usually employs, and who may have more convenient apartments or better accommodation, to give what is termed a *receipt* for the defendant to the officer who made the arrest, and which the latter officer will receive of the new officer, if he be known to him to be trustworthy, and thereupon will hand over his warrant and relinquish the custody of the defendant to such fresh officer, who may at the request of the defendant's attorney shew the defendant more indulgence than the first officer might be disposed to do, and even take his word for giving a bail bond or for putting in and perfecting bail above. But this practice is in some respects objectionable, as each officer expects a *douceur* for the civility and accommodation.

*Twenty-four,
Motions and
summons on
part of defend-
ant to set aside
a proceeding
for irregularity
in affidavit,
writ, copy, or
arrest.*

Twenty-four, Proceedings for Irregularities.—The party arrested having removed the immediate annoyance and inconvenience of an arrest, by depositing the debt and 10% for costs, or executing a bail bond, or by his attorney giving an undertaking to the plaintiff's attorney, should then immediately, or at least *before he puts in bail above*, ascertain whether the *affidavit* to hold to bail, or the *writ*, or the *copy* served on the defendant, or the *arrest*, has been sufficient, or was *irregular*, and if so, should, if the defendant be in prison under the proceeding, take out a summons in vacation, or in term time move the Court *at the earliest opportunity* to set aside the proceeding, and that

(d) 2 Saund. 60, *Rogers v. Reeves*, 1 T. R. 418, 422, but see *ante*, 273.

Form of an attorney's undertaking to put in and perfect bail above.

(e) In K. B. [or C. P. or Exchequer.]

Between { . plaintiff,
and
defendant.

In consideration of Mr. G. H. the plaintiff's attorney, having agreed, at my request, to consent to the discharge of the defendant out of the custody of the sheriff of — in this action, without executing a bail bond or making a deposit according to law, [or consenting not to arrest the said C. D. nor require a bail bond or deposit in this action,] I do hereby undertake and agree that the said defendant shall duly put in and perfect bail above in this action, but without prejudice, nevertheless, to the right to object to the affidavit or other proceeding thereon, in respect of any defect or irregularity therein.*

Dated this — day of —, A.D. 1835.

Signed, F. F. of, &c. as attorney for the said defendant, C. D. in this action.

* A plaintiff's attorney might do well to refuse an undertaking from a defendant's attorney, unless he will *expressly*

consent, in writing, to *wave* all such objections.

he may be discharged out of custody, or if he have given a bail bond, that the same may be given up to be cancelled; for after voluntarily executing a bail bond without a previous arrest, (f) and after obtaining time to put in bail, (g) and after putting in bail above, (h) and still more after perfecting bail, (i) or paying the further 10*l.* into Court under the 7 & 8 G. 4, c. 71, s. 2, any summons or motion of that nature would be too late. In the Exchequer, as any motion against the validity of an affidavit to hold to bail is considered in delay of the plaintiff, the objection he intends to rely upon must be specified in the rule nisi, or cannot be urged on the subsequent argument, but that is not the practice in the other Courts. (k)

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Twenty-five, Of Contradictory Affidavits.—Supposing the affidavit, writ, copy, and arrest to be regular in form, or not intended to be objected to; then the next consideration is, whether the necessity for causing two or more bail above to be put in for double the sum sworn to can be avoided. The general rule in all the Courts is, that no contradictory affidavit, denying the existence of the debt sworn to shall be admitted, (l) so as to vary the effect of the affidavit to hold to bail, or to dispense with the necessity to put in and perfect bail above to the full amount of the sum which any deponent has ventured to swear to, under the 12 G. 1, c. 29, so that any malicious individual who will positively swear to the existence of a named sum, may, without any previous examination of the circumstances by any Court or judge, or third person, arrest and imprison a party, and if he be unable to deposit the sum sworn to, and 20*l.* to cover costs, or to procure two persons to become his bail who can satisfactorily swear to their being worth double the sum sworn to, he may be kept in prison until final judgment has been obtained.

Twenty-five, Of motions to set aside or reduce the necessity for putting in full bail above on contradictory affidavits of the non existence of the debt.

But the Courts (especially the C. P.) have, under particular circumstances, relaxed or deviated from this harsh rule, as in a very recent case, where the affidavit to hold to bail disclosed that the debt was *prima facie* barred by the statute of limitations, and other peculiar facts were stated in a contradictory affidavit

(f) *Norton v. Danvers*, 7 Term Rep. 44, S. C. 375.

(g) *Moore v. Stockwell*, 6 Bar. & Cres. 76; 9 Dow. & Ry. 124, S. C.

(h) *D'Argent v. Vivant*, 1 East, 330; *Shawman v. Whalley*, 6 Taunt. 185; *Dalton v. Barnes*, 1 M. & Sel. 230; *Reeves v. Hucker*, 2 Tyrwh. 161, 2 Crom. & J.

(i) *D'Argent v. Vivant*, 1 East, 330.

(k) *Naylor v. Eagar*, 2 Young & J. 99.

(l) Tidd, 9 ed. 189; 1 Arch. K. B. 4 edit. 109; *Imlay v. Ellefsen*, 2 East, 453; *Isaacs v. Silver*, 11 Moore, 348.

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to shew that the plaintiff had no cause of action; the Court granted a rule nisi calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on entering a common appearance, and afterwards on shewing cause the matter was referred to the prothonotary for his fuller investigation. (m) So, if a plaintiff has acknowledged in *writing*, that no debt was due to him the Court thus interfered. (n) But it is only under strong circumstances rendering it clear that no debt does or can exist that the Court will thus interfere, especially where the defendant has actually found bail, and is no longer suffering under imprisonment. (o) The general rule (p) may on principle be well founded to avoid the temptation to perjury by defendants, who not being able to find bail, might, for the sake of obtaining liberty, be induced to swear too boldly; but on the other hand, where an affidavit to hold to bail has been made only by the plaintiff himself without corroboration by a witness to the debt, and especially under suspicious circumstances, and for a large sum, for which it would be impossible to find bail, and ruin to a defendant would probably ensue, it seems a strong measure to allow an alleged creditor on his own *ex parte* affidavit to cause imprisonment, which may afterwards be established by a jury to have been wholly unjust.

Twenty-six, Putting in bail above, or deposit in Court of sum sworn to, and £20 for costs, in lieu of bail.

1. Time of putting in bail above,

Twenty-six, Of putting in Bail above.—If on behalf of the defendant no available objection to the affidavit, writ, copy or arrest, so as to support an application to set aside the proceeding, or if it be resolved not to take any such objection, then the defendant must, in observance of the writ and statute 2 W. 4, c. 39, sect. 4 and 16, (q) *within eight days after the execution of the writ on him, i. e. of the arrest, inclusive of the day of such execution, cause special bail to be put in for him, or a proper deposit to be made within the same time; or he must, upon summons returnable before the expiration of that time, obtain a judge's order for further time to put in bail, or in default of his so doing, such proceedings may be taken as are mentioned in the warning and indorsements, viz. an assignment of the bail bond may be taken, and action thereon commenced*

(m) *Tucker v. Tucker*, 1 Harrison and Woolaston's Term Rep. 15; *Jackson v. Tomplin*, 2 Chitty's R. 20, and note.

(n) *Nizelitch v. Bonacick*, 5 Bar. & Ald. 904; *Chambers v. Bernasconi*, 6 Bing. 498; 1 Crompt. & J. 451, S. C., observed upon in *Burton v. Haworth*, 1

Nev. & Man. 320, overruling cases in Tidd, 9 edit. 189, n. (e).

(o) *Burton v. Haworth*, 1 Nev. & Man. 318; 4 Bar. & Adol. 462, S. C.

(p) See cases in note (n), *supra*.

(q) *Ante*, 150, 153, 155.

against all the obligors, or proceedings may be had against the sheriff. The 24th general rule of Hil. T. 2 W. 4, (when writs were returnable in term,) in cases of arrest elsewhere than in London and Middlesex, allowed eight days from the *appearance day* of the process, in effect *twelve days* after the return day; but that rule was virtually annulled by the 2 W. 4, c. 39, schedule No. 4, prescribing the warning to put in bail *in all cases in eight days inclusive of the day of arrest*, and putting an end to return days and appearance days in bailable process. (r) So that now the defendant *must in all cases*, without regard to distance from London, or to term or vacation, put in bail in *eight days* after the day of the arrest, inclusive of that day, and without any distinction as respects *time*, between the 10th August and 24th October. (s) But if the last of the eight days be a Sunday, Christmas-day, or Good Friday, or a day appointed for a public fast or thanksgiving, then the defendant has all the next day to put in bail. (t) Within those eight days such bail above must be put in, or a deposit of the sum sworn to, and £20 for costs in lieu of bail, under the 7 & 8 G. 4, c. 71; or if he have already deposited the sum sworn to, and £10 for costs with the sheriff, then he may deposit the additional sum of £10 for further costs, pursuant to 7 & 8 G. 4, c. 71, and 2 W. 4, c. 39, schedule No. 4, to remain in Court in lieu of bail. But in the latter cases the defendant must enter his common appearance within the same time as he had to put in bail, or the plaintiff may do so for him, and the action will then proceed precisely as if bail above had been put in as heretofore. But the defendant may, by sect. 3 of 7 & 8 G. 4, c. 71, at any time before issue joined in law or fact, or before final or interlocutory judgment, receive the money deposited out of Court, upon putting in and perfecting special bail, and upon payment of such costs to the plaintiff as the Court shall direct; (u) or the defendant may convert the payment of the amount of the debt so deposited in Court, or a part of the same, into a payment in discharge of the action, by moving that the plaintiff may take the same, or a named part, in discharge of the action, and that unless he do so, with costs to be taxed, the same may be struck out of the declaration. (x) But it has been held, that

(r) *Grant v. Gibbs*, 1 Har. & Hodges' Rep. C. P. 56; *Hillamy v. Rowles*, 5 B. & Adol. 460; *Alston v. Underhill*, 3 Tyr. 427; 1 Crom. & M. 492, S. C.; *Thompson v. Dicus*, 4 Tyr. 875.

(s) *Grant v. Gibbs*, 1 Har. & Hodges' New Rep. 56. And see *R. v. Sheriff of*

Middlesex, 2 Dowl. 286.

(t) Reg. Gen. Hil. T. 2 W. 4, r. 8.

(u) *Terrall v. Alexander*, 1 Dowl. 132; *Hanwell v. Mure*, 2 Dowl. 155.

(x) *Hubbard v. Williams*, 8 Bar. & Cres. 496.

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the money so paid in cannot be applied to a plea of tender, because the 7 & 8 G. 4, c. 71, s. 2, imports that money paid in under the act is to *remain in* Court until the end of the suit, as a security for *the costs* as well as the sum sued for; (y) and therefore in such a case the defendant must either provide and pay into Court a *further and other* sum upon pleading his plea of tender or a plea of payment into Court, or must put in and perfect bail above in the precise manner prescribed by section 3 of that act. Where money, however, had been deposited in Court in lieu of putting in and perfecting bail above, pursuant to statute 7 & 8 G. 4, c. 71, and the plaintiff obtained a verdict, it was held that he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited out of Court, and to limit his execution to the surplus only. (z) It has been expressly decided, that if a defendant be arrested before or *between the 10th August and 24th October*, he must put in and perfect bail before a judge at chambers within the same time, eight days inclusive of the day of arrest, and in the same manner as in any other part of the vacation, notwithstanding the exception in 2 W. 4, c. 39, sect. 11. (a)

Of obtaining
further time for
putting in bail.

It may be objected that some of the provisions in 2 W. 4, c. 39, and other enactments and rules, in allowing only eight days to a defendant to put in bail, or even less time to a sheriff, when the proceedings have been in a county very distant from the metropolis, are unreasonably expeditious. (b) However, in the case of bail, a defendant may, on application to a judge, obtain further time for putting in bail. (c)

Of putting in
bail at any time
pending action,
and before de-
fendant be
charged in ex-
ecution.

Bail may however, if the defendant be *in prison*, either from the commencement of the suit, or in consequence of a subsequent render, be, as of right, *put in at any time pending the action*, even after verdict, and before the defendant has been actually charged in execution, so as to enable the defendant to obtain his release; (d) but not after the defendant has been brought into Court to be charged in execution. (e) So at any time pending the suit, the defendant may deposit the sum sworn

(y) *Stultz v. Heneage*, 10 Bing. 561.

(z) *Hows v. Pike*, 2 Crompt. & J. 359.

(a) *R. v. Sheriff of Middlesex v. Wright*, 2 Cr. & M. 333; *ante*, 371.

(b) *Ante*, 247, 248, and per Park, J., in *Grant v. Gibbs*, 1 Harrison & Hodges' Rep. C. P. 58.

(c) And see form of summons and or-

der for the purpose, T. Chitty's Forms, 2nd ed. 68.

(d) *Dyott v. Dunn*, 2 Chitty's R. 72, 73, 74; 1 Dowl. & R. 9, S. C.; *Todd v. Etherington*, 2 Marsh. 374; Tidd, 9 ed. 248, 278, 279.

(e) *Bircham v. Chambers*, 11 Moore, 343.

to and £20 for costs under the statute 7 & 8 G. 4, c. 71, so as to obtain his release, and by leave of a judge, (but by an express rule, *not otherwise*),(e) the original bail may be *changed* and others substituted, or the debt and a sum to cover costs brought into Court; and this is essential when it is discovered that one of the bail is a material witness for the defendant. (f) And in a recent case the judge permitted the sum sworn to and £40 to be brought into Court even pending the trial, and one of the bail to be thereupon admitted a witness. (f)

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The term in the statute and writ of *caapias*, "*cause special bail to be put in*," is obviously a technical expression; for the bail themselves, being always two living persons, and not moveable inanimate chattels, that could be deposited, cannot literally be *put into Court*. It is a term descriptive of more than a single act, for it imports that *two* persons only (unless leave for more has been obtained,) competent to become bail, or at least not so incompetent as to constitute a nullity, shall, by acknowledging what is termed a recognizance of bail according to the practice of the Court, become bound for the defendant that he shall pay the sum that may afterwards be recovered by a judgment, or render himself to the proper prison of the Court, or that the bail themselves will do so for him, i. e. pay the debt and costs, or render him to such custody. *Secondly*, that such bail, if required, shall *justify*, i. e. swear and establish, to the satisfaction of a judge of the Court, their competency to become such bail in every respect; and *thirdly*, by the general practice of the Courts, and by an express rule of Court of Common Pleas, Easter T. 49 G. 3, it was ordered that special bail shall not be considered "*put in*" until *due notice* of their having become bail should have been given; and it has been recently held, that unless or until such notice has been regularly given, the condition of the bail bond "*to cause bail to be put in*," has not been complied with, so that if such *notice* be not given in due time, the plaintiff in the action, or the sheriff, may on that account prosecute an action on the bail bond. (g)

Import of term
"putting in
bail," and se-
veral requisites
of.

As soon as practicable after an arrest, the defendant should obtain the *express consent* of two persons, who are in *every respect competent* to become bail, that they will do so; and he should be certain that he can confide on their *continuing friend-*

Proceedings ante-
cedent to put-
ting in bail
above, and who
competent to
become bail,
and to what
facts they must
be prepared to
swear.

(e) Reg. Gen. Trin. T. 1 W. 4, r. 5.

(f) *Baillie v. Hole*, 1 Mood. & M. 289; 3 Car. & P. 560, S. P.; *Young v. Wood*, Barnes, 69; Bing. 92; 2 Chitty's

R. 403.

(g) *Grant v. Gibbs*, 1 Har. & Hodges' New Term Rep. 56.

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ship, or at least that they will not suddenly and without notice take him (as they legally might do at any time pending the action, and even on a Sunday,) and render him into the prison of the Court, and also that neither will be a material witness for him. For this purpose the proposed bail should be fully apprized of the *extent of their liability* (now declared) by the general rule of Hilary Term, 2 W. 4, rule 21, viz., to the *sum sworn to* and the costs of suit, not exceeding in the whole the amount of their recognizance, (*h*) and of the circumstances and the nature and amount of the property which they may be required to swear to after payment and satisfaction of all their just debts and engagements for this purpose, and in order to be well assured that there will be no subsequent difficulty, it may be expedient to lay before each of the bail *the form of the affidavit* now required, when bail justify in the first instance, and request him well to consider whether he can with propriety swear to the same, and to give his answer so speedily, that in case it should be unfavourable, the defendant's *attorney* may be able to procure other bail and give notice of the same in sufficient time; and this precaution is more essential, since bail cannot now be added or changed without leave, and probably such leave would be refused, unless it be made appear that full inquiries into the circumstances of the proposed bail had been made in the first instance.

The requisites to which bail must be prepared to swear.

The *form of affidavit* of the sufficiency of bail, as prescribed by the general rule, Trinity term, 1 W. 4, *when accompanying the notice of bail*, (with the additional requisite of the bail swearing that they are *worth* the amount as ordered by Reg. Gen. Hilary term, 2 W. 4, r. 19, in addition to the swearing merely to their *possession* of the property,) and as given in the subscribed note, affords a good practical outline of the requisites of *all bail*; the prohibitory exceptions will be presently considered. (*i*)

(*h*) Jervis's Rules, 47, note (*u*).

Form of affidavit of each bail, justifying in anticipation, under Reg. Gen. Trin. T. 1 W. 4, and subsequent rules.

(*i*) In the [.]

A. B. of No. 8 in ——— Street, in the parish of ———, in the county of ———*
one of the bail for the above named defendant, maketh oath and saith that he is a
housekeeper [or freeholder as the case may be] residing at [describing particularly the

Between, &c.

* The Gen. R. Trin. T. 1 W. 4, gives this form of affidavit without any addition, and some of the forms do not state the *addition* of the deponent, but such addition ought to be stated, though time may be given to amend, *Morgan v. Stone*, 1 Gale, 15; *Tresure's Bail*, 2

Dowl. 670.

† Householder would be insufficient, and a lodger, therefore, unless he be a freeholder, and so stated in the notice of bail, would be insufficient, *Wilson's Bail*, 2 Dowl. 431.

Each bail must be a *housekeeper*, (not a lodger, householder or leaseholder, or a mere occupier of less than the main part of a house, (*j*)) or he must be a *freeholder* or *copyholder* in fee or for life in his own right and not in right of his wife, (*k*) and not a mere householder or leaseholder, however long the term of years, (*l*) and the housekeeping or freehold must be in England or Wales, and not in Scotland or Ireland. (*m*) But where partners both keep the same house, both may be bail, though one of them only lodge in the neighbourhood. (*n*) The property of each to be sworn to must be double the sum sworn to in the affidavit to hold to bail, or if that sum exceed 1000*l.*, then 1000*l.* in addition to it, after paying all his just debts.

Hence it is to be collected that each of the bail must be able to swear, first, that he is a *housekeeper*, not merely a *householder*, or that he is a *freeholder*, or copyholder in his own right; *secondly*, to state the full particulars of his present and antecedent residences for the last antecedent six months, in order that the plaintiff's attorney may thereby be better enabled

Summary of who can or cannot become bail.

street or place, and number if any) that he is worth* property to the amount of £—— [the amount required by the practice of the Courts] over and above what will pay all his just debts,† [if bail in any action, add, "and every other sum for which he is now bail,"] and that he is not bail for any defendant except in this action [or if bail in any other action or actions, add, "except for C. D., at the suit of E. F., in the Court of ———, in the sum of £——, for G. H., at the suit of J. K., in the Court of ———, in the sum of £——," specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail]: and that the deponent's property, to the amount of the said sum of £—— [and if bail in any other action or actions "of all other sums for which he is now bail as aforesaid"] consists of [here specify the nature and value of the property in respect of which the bail proposes to justify as follows:] "stuck in trade in his business of ———, carried on by him at ———, of the value of £——; of good book debts owing to him to the amount of £——; of furniture in his house at ———, of the value of £——; of a freehold [or "leasehold"] farm of the value of £——, situate at ———, occupied by ———, or "of a dwelling-house of the value of £——, situate at ———, occupied by ———" [or of other property, particularising each description of property, with the value thereof.] and that this deponent hath for the last six months resided at ——— [describing the place or places of such residence, or if he has had more than one residence during that period state the same,] and not elsewhere.‡

Sworn, &c.

* The word "worth," in lieu of "possessed," is rendered necessary by Reg. Gen. Hil. T. 2 W. 4, r. 19. He's possessed, &c. instead of he is possessed, held sufficient, *Lanyon's Bail*, 3 Dowl. 85. Where the affidavit of justification by country bail omitted to state that each of the bail was worth the sum required, but merely stated that they were possessed, &c. time to amend the affidavit was refused, *Rogers v. Jones*, 3 Tyr. 256,

sed quare, as to the refusal of time to amend, see *Darling v. Hutchinson*, 2 Tyr. 491; 2 Crom. & J. 487, S. C., where time was allowed.

† The words "what will pay" have been introduced in consequence of Reg. Gen. Hil. T. 2 W. 4, r. 19.

‡ Mr. Chapman, in his edition of the New Rules, p. 48, suggests that the concluding negative should be inserted, sed quare.

(*j*) *Bold's Bail*, 1 Chitty's R. 283, 316, 502.

(*k*) *Anon.* 2 Chitty's R. 97.

(*l*) *Smith's Bail*, 1 Dowl. 1, 127.

(*m*) *Anon.* 1 Dowl. 61; *aliter*, if the

bail be a native of England, 1 Arch. K. B. 4th ed. 197, note (s).

(*n*) *Hemming v. Plenty*, 1 Moore, 329; *Savage v. Hall*, 1 Bing. 430; 8 Moore, 525, S. C.

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to inquire into his property, character and circumstances; *thirdly*, to swear that he is *worth* (not merely *possessed* of) property to a named amount, being a sum equal to the required amount, viz. of double the sum sworn to, or 1000*l.* above the sum sworn to, over and above not only his own just *debts*, but also his *liabilities* as bail in other actions, or that he is not bail in any other action. Persons, on being applied to to become bail, should *immediately* and in the first instance be requested deliberately to examine into and consider the nature and extent of their property and of their debts and liabilities, and as soon as possible to communicate the result to the defendant's attorney, so that if the inquiry turn out unsatisfactory, notice of bail more competent to justify may be given; and *fourthly*, the proposed bail must be prepared to specify the *particulars* of his property of the requisite value, and to shew where it is situate or to be found.

By rules of Court and established practice there are *disqualifications to become bail*; some persons are so absolutely disqualified as if put in as bail to constitute a nullity; and others only so, if objected to. Questions of this nature in general relate to peers or members of the House of Commons, and other persons, who, being privileged, would not be desirable sureties. Practising attorneys and their clerks, except for the mere purpose of rendering a defendant, are so disqualified, that the putting them in as bail might be treated as a nullity. (p) Sheriffs' officers and gaolers, bankrupts and discharged insolvent debtors, and persons in doubtful circumstances, residing in privileged places; and foreigners, having no property in England, may also be objected to with effect. These disqualifications have been so ably examined in previous publications that it would be redundant here to investigate the subject at length.

Moral character.

At one time it was supposed that defect in moral character constituted an objection to bail, at least when the deviation excited a suspicion that if the party really had property, he would not have been guilty of the deviation. Thus a person, who proposed to justify as bail for a *friend*, was rejected because he had suffered his child or his father to continue in gaol. (q) But no such ground of objection at present prevails, and even the keeper of a brothel has recently been permitted to justify as bail in respect of his property. (r)

(p) Reg. Gen. Hil. T. 2 W. 4, r. 13; 78; and see *Anon. id.* 77.
Jervis's Rules, 45, note (u).

(r) *Gonge's Bail*, K. B. Hil. T. 1835,
(q) *Holme v. Booth*, 2 Chitty's Rep. 9 Legal Obs. 331.

The general rule of Hilary term, 2 W. 4, r. 18, orders that *notice of more* bail than *two* shall be deemed irregular, unless by order of the Court or a judge, thus rendering the practice of the Courts of King's Bench and Exchequer similar to that of the Court of Common Pleas. (s) In cases, therefore, where, in consequence of the magnitude of the debt or other circumstances, two bail cannot be obtained, the defendant should, upon a proper affidavit of the facts, in due time apply by summons to a judge for leave to put in as many bail as may be shewn to be essential, and an order for which will be readily granted. (t)

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Not more than two bail to be put in, without previous leave of a judge.

The mode in which the sureties for the defendant *testify their consent* to become bail, is nearly in the same terms in all the Courts. (u) It will be observed that in the form of their contract not even the precautions enacted by the statute against frauds, 29 Car. 2, c. 3, s. 4, in ordinary engagements for the debt, default or miscarriage of a third person are required. In the King's Bench and Common Pleas, in case of town bail, the intended sureties merely attend before a judge or an appointed officer, and a bail-piece in the subscribed form in the King's Bench (x)

The mode or form in which the sureties become bail in the several Courts.

- (s) *Jervis's Rules*, 46, note (s). 601; and see form of affidavit, &c.
(t) *Id. ibid.*; *Easter v. Edwards*, 1 T. Chitty's Forms, 2d edit. 68.
Dowl. 39; *Jell v. Douglas*, 1 Chitty's R. (u) *Bagley's Prac. Ch.* 138.

(x) In the King's Bench [or Common Pleas or Exchequer.]

On the ——— day of ——— A. D. 1835.

Middlesex [the county in the writ] to wit. C. D., [defendant,] is delivered to bail upon a *cepi corpus* to

{ Job Allen, of Red Lion Street, Holborn,
county of Middlesex, Taylor,
and
Thomas Jackson, of Hart Street, Bloomsbury
Square, in the said county, Ironmonger.

Oath for £50
E. F. of
Clifford's Inn,
Attorney for the Defendant. }

At the suit of A. B.
N. B. Here the bail sign their
names when proceedings
in the Exchequer.

Taken and acknowledged, condition-
ally, at my Chambers in Serjeants'
Inn, Chancery Lane, this
—— day of ——— A. D. 1835.

Before me [Judge's signature.]

Form of bail-
piece on parch-
ment in either
Court.*

* See a printed form, Chitty's Summary 321, before the 2 W. 4, c. 39; and see other forms in T. Chitty's Forms, 2d edit. 69, 70.

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is produced, and the bail *verbally* enter into their engagement, and do not even sign the bail-piece as in the Exchequer. It has been considered that the circumstance of the verbal engagement being entered into before one of the judges or a regular officer of the Court affords sufficient protection against misapprehension or fraud, and on that account we have seen that even an infant may be bound. (x) Ancient statutes also rendered it a capital offence to personate bail. The course is for the judge, or rather an officer of the Court in his presence, or a commissioner, addressing himself to the two bail, to state to them verbally the substance of their engagement, varying in some respects in each Court, and then asks them *are you content?* to which they verbally express their consent, and then depart. (y) In the Exchequer, however, the *bail-piece* is not only produced to but signed by both the bail, a form which it would be well to adopt in the other Courts. Afterwards, at any time before issue joined on the existence of the record of the recognizance, there is a formal record of the proceedings and the recognizance is drawn up on parchment. (z)

The modes of putting in bail, with whom or before what officer and for what county bail must be put in.

The *modes* or *before whom* bail must be put in, vary in several cases, for they may be put in before a *judge in town*, or before a *commissioner* in the country, or before a judge pending the circuit. The bail must now by express rule in *all* cases be put in with the *filacer*, who signed the process on which the defendant was arrested, whether that was the first process or not, it being ordered by the general rule of Michaelmas term, 4 W. 4, A. D. 1834, that where a defendant is arrested upon an alias or pluries, issued into another county, pursuant to the rule of Michaelmas term, 3 W. 4, s. 7, the defendant must put in bail in the *county* where he was arrested. (a) The defendant's attorney must observe great care in this respect, for if by mistake the bail should not be put in in the *proper office*, where only the plaintiff's attorney is bound to search, but in a *wrong office*, an assignment of the bail-bond or proceedings against the sheriff might be taken, and much costs incurred in setting the same aside, even if that indulgence should be granted without an affidavit that the defendant has a sufficient defence on the merits.

(x) *Ex parte Williams*, M'Clel. Exch. Rep. 495; *ante*, vol. ii. 396.

(y) See *Forms*, T. Chitty's *Forms*, 2d edit. 69.

(z) See T. Chitty's *Forms*, 2d edit. 310 to 312.

(a) Reg. Gen. Mich. T. 1834; see 4 Tyr. 1; 2 Crompt. & M. 352.

We have seen that the expression in the stat. 2 W. 4, c. 39, s. 4, and writ of *capias*, "*putting in bail*," implies also the necessity for *giving notice of such bail having been so put in*, and that, until such notice has been duly given, bail are not to be considered as *having been put in*. (c) The rule Mich. T. 16, Car. 2, still in force, requires the plaintiff's attorney to give a *written notice of the bail having been put in before the time for putting in bail has expired*, so as to prevent an assignment of the bail bond, and it has been decided that it is no bail until such notice has been given, so that the defendant's attorney should serve the *notice of bail* before nine o'clock at night on or before the eighth day after the arrest, inclusive of that day, or obtain further time for putting in bail and giving such notice. (d) Amongst the other general rules of Trin. T. 1 W. 4, the 2d rule requires that *every notice of bail* shall, in addition to the description of the bail, mention the *street, or place and number*, if any, where each of the bail resides, and all the streets or places and numbers, if any, in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder. (e) But an uncertainty as to the description of the residence may be aided by an annexed affidavit of justification. (f) Upon the requisites of the notice of bail, there have been many decisions, most of which have been so ably collected and digested in the recent publications, that it would be inexpedient here to do more than take a very compact view of the subject. (g) The forms of the proceedings relative to bail are very numerous, those of most general use will be found in the notes. (h)

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Notice of bail prospectively or of the same having been put in, and requisites of each notice. (b)

(b) See in general, Tidd, 9th ed. 253; 1 Arch. 4 ed. 179.

(c) *Ante*, 373; *Grant v. Gibbs*, 1 Harrison & Hodges' New T. R. 56; and see Rule Easter, 49 G. 3, C. P. Tidd, 253.

(d) *Id. ibid.*; — *v. Pasman*, 5 Taunt. 759.

(e) Jervis's Rules, p. 25, 26, note (l), and decisions on the rules there collected;

see *Fenton v. Warre*, 2 Tyr. Rep. 158; 2 Crom. & J. 54, S.C.; see form and notice, *infra*, (h).

(f) *Ward's bail*, 3 Tyr. 208.

(g) As to the notice of bail and other proceeding, see Jervis's Rules, 26, 27, n. (l); Tidd, 9th ed. 253 to 297; and 1 Arch. K. B. 4th ed. 179 to 211; T. Chitty's Forms, 71 to 94.

(h) Every form that can be required will be found in Tidd's Forms and Supplements; T. Chitty's Forms, 2nd edition, and in Chitty's Summary of Practice, 316 to 336. The form of affidavit of justification, which may be made by each bail separately in anticipation, under the Gen. Rule, Trin. T. 1 W. 4, reg. 3, has been given *ante*, 374, 375. That form includes all the requisites to be observed.

In the K. B. [or C. P. or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

Usual notice of bail having been put in in K. B. or C. P. or Exchequer, in town, and that

Take notice, that special bail was this day put in [if in C. P., say, "put in with the filacer"] in this cause for the defendant before the Honourable Mr. Justice — [or

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It has recently been decided, that a plaintiff cannot take proceedings on a bail bond on the ground of an informality in the notice of bail, (i) and the Court of Exchequer has de-

both are
housekeepers,
and one also a
freeholder, and
showing their
residences for
the last six
months.

Mr. Baron —] at his chambers in Serjeants' Inn, Chancery Lane, London,* and the names, additions, and particulars of and relating to such bail are as follows. The said bail are John Adams, of No. 31, Red Lion Street, Holborn, in the county of Middlesex, tailor, and who is a housekeeper there; and Joseph Pitt, of No. —, — place, in the said county, ironmonger, and who is a housekeeper there; and who is also a freeholder of a messuage and land in the parish of Dagenham, in the county of Essex, and which is now in the possession of O. P. as his tenant. [All these statements are to accord precisely with the facts, and see affidavit, ante, 374, 375.] And the said J. A. hath resided continually for upwards of the last six months at No. —, — street aforesaid, and the said Joseph Pitt, in the month of — last, [just before the commencement of the last six months] did reside at No. 7, in Milman Street, Guildford Street, in the county of Middlesex, and in that month he removed from thence to No. —, — street, in the county of —, where he resided continually from on or about the — day of the said month of — until on or about the — day of — last, and on or about that day he removed from thence to No. —, — street aforesaid, and from that time the said Joseph Pitt hath there resided continually till this day. [If the notice of bail is to be accompanied with an affidavit of their sufficiency in the form as ante, 374, 375, then conclude as follows.] “And further take notice, that the said J. A. and J. P. [names of the bail] have duly made and sworn to the affidavits which accompany this notice for your perusal, and copies of which affidavits are herewith left.” Dated this — day of —, A. D. 1835.

Yours, &c. E. F.
No. 10, Clifford's Inn,
Defendant's attorney,
[or agent.]

To Mr. G. H. Plaintiff's attorney, &
[or agent.]

Four days' notice that bail will be put in, and will justify at the same time in open Court in person.

In the K. B. [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

Take notice, that special bail will be put in in this cause for the defendant on — the — day of — instant, [or “next”] in open Court, at Westminster Hall, and the names and additions of the persons so to become such bail are, &c. [State the names and additions of the bail, and whether they are housekeepers or freeholders, and their residences for the last six months, as in the last form to the end, and then conclude thus.] And further take notice, that the said J. A. and J. P. will, at the same time, justify themselves as good and sufficient bail for the said defendant. Dated this — day of — A. D. 1835.

Yours, &c.
E. F. of —,
Attorney for the defendant.

To Mr. G. H. Plaintiff's attorney [or agent.]

Notice of putting in and justifying bail before a judge at chambers in vacation.

In the K. B. [or C. P. or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

Take notice, that J. A., of, &c., and J. P., of, &c., [describe as in last forms] will, on the — day of — next, [or, “instant,”] be put in as special bail for the defendant in this cause, and will on the same day, at the hour of — of the clock in the forenoon, justify themselves before the Honourable Mr. Justice — [or “Baron —,”] or such other judge [or “baron,”] as shall be then sitting at his chambers, in Serjeants' Inn, Chancery Lane, London, as good and sufficient bail for the defendant in this cause.

* In the Exchequer, it is no longer necessary to state in the notice, that the bail piece has been filed, *Wigley v. Edwards*, MS. Exchq. 20 November, 1833; *Jervis's Rules*, p. 7, note (m).

(i) *R. v. Sheriff of Middlesex*, 3 Tyr. 448; *Wigley v. Edwards*, 2 Cr. & M. 320; 4 Tyr. 235; *Jervis's Rules*, 7, note (m).

clared that in future it is not to be considered necessary in that Court any more than in K. B., to state in a notice of bail

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And take further notice, that (&c., *here state whether the bail are freeholders or housekeepers, and their residences for the last six months, &c., as in the form ante, 379, 380, to the end*).

Dated this — day of —, A. D. 1835.

To Mr. G. H. Plaintiff's attorney,
[or agent.]

Yours, &c.
E. F. of —
Attorney for the defendant.

I except against these bail.

G. H. plaintiff's attorney,
12th March, 1835.

Usual entry
of exception.

In the K. B. [or C. P., or Exchequer of Pleas,]

Between { A. B. plaintiff,
and
C. D. defendant.

The usual notice
of exception to
bail.

Take notice, that I have excepted against the bail put in in this cause for the defendant, [and if it be intended to require the bail to justify before a judge at chambers in vacation, then add, "And I hereby give you notice, that I require such bail to justify before a judge at chambers."] Dated this — day of — A. D. 1835.

Yours, &c.

To Mr. E. F. defendant's attorney,
[or "agent,"]

G. H. plaintiff's attorney,
[or "agent,"]

In the K. B., [or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

Usual notice of
justification in
Court in K. B.
or Exchequer
in person or by
affidavit.

Take notice, that J. A. and J. P. the bail *already put in* in this cause for the defendant, and of whom you have before had notice, will on — next justify themselves [if country bail, here say, "by affidavit,"] in open Court, at Westminster Hall, in the county of Middlesex, as good and sufficient bail in this cause for the defendant.* Dated the — day of — 1835.

Yours, &c.

To Mr. G. H., plaintiff's attorney,
[or "agent,"]

E. F., defendant's attorney,
[or "agent,"]

In the C. P.

Between { A. B. plaintiff,
and
C. D. defendant.

The like in
C. P.†

Take notice, that J. A. and J. P., the bail *already, &c. [same as the last to the asterisk, and then as follows,]* and the additions, descriptions, particulars, and residences of such bail, have been, and are, as follows, namely, the said J. A. of No. —, [describe as in form ante] and who is a housekeeper there, and the said J. P. of No. —, [describe as in the form ante] and who is a freeholder of a messuage and land in the parish of, &c. [repeating the addition, description, particulars, and residences of the bail during the last six months as ante, 379, 380.] Dated this — day of — A. D. 1835.

To Mr. G. H., plaintiff's attorney,
[or "agent,"]

E. F., attorney,
[or "agent,"]

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

Notice of justification
before a judge
at chambers,
on 1 W. 4, c.
70, s. 12.

Take notice, that J. A. and J. P., the bail *already put in* in this cause for the de-

† The reason for this form in C. P. differing from that in K. B. and Exchequer is that the rule M. T. 7 G. 4, C. P. 4 Bing. 51, expressly requires a notice of justification,

although of the *same bail*, to repeat the description of the addition and residences of the bail, but which is not necessary in K. B. or Exchequer, Tidd, 259, 266.

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that the bail piece has been filed with the filacer at the proper office. (j)

defendant, and of whom you have had notice, will, at the hour of — o'clock in the forenoon, on — next, justify themselves [if the bail were put in before a commissioner in the country, here say, "by affidavit" before the Honourable Mr. Justice — [or Baron —] or such other judge [or baron] as shall be then sitting in chambers, in Serjeants' Inn, Chancery Lane, London, [or if any other place be appointed, "at —, in the county of —"] as good and sufficient bail for the said defendant.* [In the C. P. here repeat the addition, description, and particulars of the bail, and their residences during the last six months, as directed in the form supra, 381; but see Jervis's Rules, 26, note (l).] Dated this — day of — A. D. 1835.

To Mr. P. A., plaintiff's attorney,
[or "agent."]

Yours, &c.
D. A., defendant's attorney,
[or "agent."]

Affidavit of the
service of notice
of justification.

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

J. K. clerk to E. F., of —, gentleman, attorney for the above-named defendant, maketh oath and saith, that this deponent did on the — day of — instant, before eleven o'clock in the forenoon,† serve Mr. G. H. the attorney for the above named plaintiff, with a true copy of the notice hereunto annexed, marked "A" [annex an exact full copy] by delivering the same to and leaving it with a clerk of the said Mr. P. A., at his chambers, in —, [or if the service were on the attorney personally then from the above asterisk proceed thus: "personally serve Mr. P. A. the attorney for the above named plaintiff, with a true copy of the notice hereunto annexed."]

Sworn, &c.

J. K.

Affidavit of
justification
of country bail
sworn before a
commissioner
in the country,†

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

J. A., of the parish of —, in the county of Kent, farmer, and J. P. of High Street, Maidstone, in the same county, linen draper, severally make oath and say, and first this deponent, J. A. for himself saith that he is a housekeeper, in the parish of — aforesaid, in the county of Kent aforesaid, and that he this deponent is worth the sum of £ — [double the sum sworn to] over and above what will pay all his just debts and every other sum for which he is now bail, or is in any respect whatsoever liable or chargeable, [or say, "that he is not bail," &c. the same as in the form, ante, 374, 375, stating also the nature of the deponent's property as there stated, and his residences during the last six months]. And this deponent, the said J. P. for himself saith that he is a housekeeper, &c. [state also that he is worth the requisite amount, and the nature and situation of his property, and his residence for the last six months as in the form, ante, 374, 375, 380.]

The above named deponents, J. A. and J. P. were severally and respectively sworn to — in the county of —, this — day of —, A. D. 1835, before me, X. Y. [a commissioner for taking affidavits in the Court of —.]

J. A.
J. P.

X. Y.

† These words are here introduced in consequence of Rule Trin. T. 59 G. 3, K. B. 2 Bar. & Ald. 818; Rule Mich. T. 60 G. 3, C. P. 4 Moore, 2; and Rule T. 59 G. 3, in Exchequer, 8 Price, 509, requiring service to be sworn to when the notice was served only two days before the morning of justification, but if the notice were served three or more days before the appointed time no statement of the hour of service is necessary.

‡ This form is the fullest, and best cal-

culated to anticipate and prevent subsequent trouble in obtaining explanatory affidavits; but the next more concise form still suffices in the first instance, though the above is preferable. If the two bail live at considerable distances from each other, then it is usual to make separate affidavits, and swear them before different commissioners.

(j) See note * ante, 380; and Wigley v. Edwards, Jervis's Rules, 7, n. (m).

The other practical proceedings relating to bail are numerous and somewhat complex, and if very fully considered would fill a volume. There are several *general rules* relating to bail of Trinity Term, 1 W. 4, and rules 1 to 6 (k) of Hil. Term, 2 W. 4, rules 13 to 31, which, with some useful notes relating to the same by Mr. Jervis, should be carefully examined. (l) These rules and proceedings relate as well to bail when taken in *London*, as when taken in the *Country*; and when the latter, regulate the *time* (m) and mode of transmitting the bail piece to London and filing the same.

Before the rule of Trinity Term, 1 W. 4, bail were put in and did not justify unless expressly required by the plaintiff's attorney to do so. But now by that rule bail may save the trouble of two attendances and *justify* at the same time that they are *put in*, upon giving four day's notice before eleven o'clock in the morning, exclusive of Sunday; and by rule 3 of the same term, if the notice of bail shall be accompanied by an

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The other practical proceedings relating to bail.

Time and mode of putting in bail.

In the King's Bench, [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

J. A., of —, and J. P. of —, bail in this cause for the above named defendant, severally make oath and say, and first this deponent J. A. for himself saith, that he is a *housekeeper* at No. — aforesaid, and that he this deponent is *worth* the sum of £ — over and above what will pay all his debts; and this deponent J. P. for himself saith, that he is a *housekeeper* at No. — aforesaid, and that he, this deponent, is *worth* the sum of £ — over and above what will pay all his debts.

The above named deponents, J. A. and J. P. were sworn at — the — day of —, A.D. 1835, before me,

Y. Z.
A commissioner.

Another form of justification of country bail, sworn before a commissioner.*

In the K. B. [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,
and
C. D. defendant.

L. M., of —, clerk of Mr. G. H. of —, attorney for the plaintiff in this cause, maketh oath, and saith, that a notice of justifying bail in this action having been served on the said G. H., he, this deponent, by his direction hath made diligent inquiries into the sufficiency of the said bail, and saith that, &c. [here state the particular objections intended to be relied on against the bail according to the facts, avoiding any unnecessary calumny and general abuse, 1 Chitty's Rep. 676, Tidd, 274; and when the representation of neighbours or other matter of hearsay be stated, "and the whole of which statements and information this deponent verily believes to be true."] And this deponent further saith that B. B. one of the said bail, hath been a bankrupt, and hath not yet obtained his certificate, as this deponent hath been informed and verily believes, [or "hath been twice a bankrupt," or "that the said B. B. hath obtained his discharge under the last insolvent act," or otherwise according to the facts.]

Sworn, &c.

L. M.

Affidavit to oppose bail.

* See the last preferable form and note, ante, 382.

(k) Jervis's Rules, 25 and 32.

(l) Jervis's Rules, p. 45 to 50; and *id.* Index, tit. Bail.

(m) R. Hil. T. 2 W. 4, r. 15.

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affidavit of each of the bail, (n) according to the form subjoined to the note, and which we have already stated. (o) And if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a judge thereof shall otherwise order. (o) And the 4th rule of the same term orders, that if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit, and the bail become complete. The first rule, however, provides that if the plaintiff shall be desirous of time to inquire after the bail, and shall give *one day's notice* thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time (not to exceed three days in the case of town bail, and six days in the case of country bail,) then (unless the Court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

In general, bail are put in and notice thereof given, without any antecedent or prospective affidavit of justification; and if the plaintiff's attorney be satisfied with the sufficiency of the proposed bail, he takes no proceedings relating to them, and the bail become absolute, or in other terms complete.

Entry of exception to bail.

If the sufficiency of the bail be disputed, the plaintiff *excepts to them*, which must be done within limited times, or they become complete. The mode of excepting is by writing in a book at the proper office of the particular Court, "I except against these bail. E. F. Plaintiff's Attorney. April 15, 1835." (p)

Written notice of exception.

A *proper written notice of such exception* must thereupon be given; (q) the proper form of which has been stated in a previous note. (r)

Of adding bail.

Thereupon if it be discovered that the named bail cannot

(n) It seems that in this particular case of a *prospective* affidavit of justification, the affidavit of each of the bail must be separate, Reg. Gen. Trin. T. 1 W. 4, r. 3. In other cases it may be joint or separate, according to the convenience of the bail.

(o) *Ante*, 374, 375.

(p) See form, *ante*, 381, in note; R.

v. *Sheriff of Middlesex*, 5 Bar. & Cres. 389; *Hodgson v. Garrett*, 1 Chit. R. 174; Tidd, 301.

(q) T. Chitty's Forms, 74; R. v. *Sheriff of Middlesex*, 5 Bar. & Cres. 389; *Hodson v. Garrett*, 1 Chit. R. 174; T. 301.

(r) *Ante*, 381, in note.

justify, the course is to endeavour to obtain leave of a judge to *change* the bail, but which is no longer a matter of course. (s)

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If the *same bail* are to justify, the defendant's attorney must then serve a *written notice of the intention to justify*, at least *two days* before the intended time of justification, which by express rule is to suffice, (t) but which must be, by several particular rules of each Court, sworn to have been served before eleven o'clock of the forenoon of the second day before justifying, or on a *third* previous day. (t)

Written notice of justification, when to be served.

But upon a sufficient affidavit of the illness of one of the bail, or other unexpected occurrence, preventing the justification within the named or proper time, further time may be obtained, (u) except in cases of bail or error, or on habeas corpus, when more strictness is required, and a very sudden or extraordinary occurrence to prevent the attendance of bail will be the only admitted excuse.

Of obtaining further time to justify.

At the time appointed for justifying bail in person, there must be an *affidavit of the due service of a notice of justification*, (x) and to which a copy of such notice is to be annexed.

Affidavit of service of such notice.

The next step is to make a concise brief for counsel, entitled in the cause, and indorsed "Mr. —, to move to justify," and which, when signed by the counsel's signature under the fee, is usually handed to the proper officer. But it is recommended to every careful practitioner to have another *private brief*, which the defendant's counsel may retain, and which should contain a full and not a mere abbreviated copy of the notice of justification and all affidavits, but also instructions to answer any objection that may possibly be urged against the bail.

Brief and motion to justify bail in Court in term.

The proper officer will then cause the bail to be called in due order, and which is effected by calling the name of the defendant, thus: "C. D.'s bail." Whereupon such bail, if they be in attendance, come forward and are sworn to answer all questions.

Calling and appearance of bail to justify.

The *justification* of bail in *term time* now usually takes place before one of the judges, early in the morning, viz. from half-past nine o'clock, until all the bail in attendance have been examined, differing but little in the three Courts.

The usual hour of bail justifying.

Sometimes counsel are instructed to *oppose* the bail, and

Opposition to bail.

(s) Reg. Gen. Trin. T. 1 W. 4, r. 5; Jervis's Rules, 27, 28, note (p).

(t) Hil. T. 2 W. 4, r. 16; Jervis's Rules, 46, note (q); and see form of affi-

davit, 382, in note.

(u) *Gublett's Bail*, 1 Harrison's New Term Rep. 111.

(x) See form, ante, 382, in note.

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Allowance of
bail, and rule
for allowance of
and service
thereof on
plaintiff's at-
torney.

affidavits on each side ~~are~~ adduced, and concise arguments, or rather observations, take place, upon which the judge decides.

If the bail be *allowed*, a rule for the allowance should be forthwith drawn up and served upon the plaintiff's attorney, for until such service the allowance is considered incomplete, and the plaintiff's attorney might proceed on the bail bond, or against the sheriff, as if the bail had not justified; and this although the plaintiff's attorney himself attended and heard the judge decide in favor of the allowance of bail. (y) After service of the rule for the allowance of the defendant's bail, they become complete, and the defendant is considered completely in Court, so that the plaintiff may declare *absolutely*, and regularly proceed in the action.

The declaration,
how affected by
the process of
capias.

As far as process affects the *time* and *mode* of delivery, it seems clear that the plaintiff may always declare *de bene esse* upon a writ of capias, being process against the *person* of the defendant; though we have seen that he cannot do so upon a writ of summons (x) or distringas. (a) The uniformity of process act, 2 W. 4, c. 3, it is true, is silent on the subject; but the *general rule*, Mich. T. 3 W. 4, r. 11, (b) expressly orders, that as regards actions commenced *by writ of capias*, and whether all the defendants have been arrested, or one or more of them has not been arrested, but only served with a copy of the writ, (c) the plaintiff may declare *de bene esse*, i. e. before the bail above have been perfected. (c)

Where a defendant or several defendants have been arrested, and have put in bail above to a *capias*, and are not in custody, the *general rule* Mich. T. 3 W. 4, prescribes *three* forms for *commencing* the declaration; the first where the party arrested is not in custody, the second where he remains in custody of the sheriff, or marshal, or warden, and the *third* where one or more of several defendants has been arrested, and another defendant only served with a copy of the process, and has not been arrested. The particulars relative to those forms will be more properly examined in the chapter relative to the practical conduct of the pleadings in an action.

(y) *R. v. Sheriff of Middlesex*, 2 Chit. Rep. 99; *Holland v. White*, 2 B. & P. 341; *R. v. Sheriff of Middlesex*, 4 T. R. 493; *sed quære* the principle of allowing an attorney to obtain costs so dishonourably.

(x) *Ante*, 296.

(a) *Ante*, 321, 322.

(b) See rule, *ante*, 161, in note.

(c) 1 Arch. C. P. [68], 1; *Gilbert v. Kirkland*, 1 Dowl. 153.

PROCEEDINGS ON A BAIL BOND.

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The proceedings on a bail bond can only ensue on account of the defendant's *neglect to put in bail above*, in the technical sense of that term, within eight days inclusive after the arrest, or afterwards to *perfect* such bail; the proceedings on such bail bond are therefore obviously only *collateral* to the principal action, and to enforce the putting in and perfecting bail above, or where the bail-bond has been ordered to *stand as a security* to secure the payment of the debt and costs, or render of the defendant at the termination of the suit. A bail bond itself, it will be observed, is *principally regulated* by the 23 Hen. 6, c. 9, but it is influenced by subsequent enactments and rules. A general rule of Hil. T. 2 W. 4, r. 24, ordered that no bail bond taken in London or Middlesex shall be put in suit until after the expiration of four days, nor if taken elsewhere till after the expiration of *eight days* exclusive from the appearance day of the process; (*d*) but that rule was virtually annulled by the 2 W. 4, c. 39, abolishing the prior writs returnable on a general or particular day, and now requiring bail above to be put in in all cases within *eight days inclusive* of the day of arrest, without regard to the distance of the place of such arrest. So that now in all cases, unless the bail above be *put in* and notice thereof given within such eight days, the plaintiff may on the ninth take an assignment of the bail bond, and commence his action thereon. (*e*) In general only one action should be commenced, and not three separate actions. (*f*)

At common law a chose in action is not assignable so as to enable the assignee to sue thereon in his own name, but as regards a bail bond the statute 4 & 5 Ann. c. 16, s. 20, introduces an exception, and if a *bail bond* be forfeited, the sheriff may, in the presence of *two witnesses*, assign the same to the plaintiff in the action, and *he* may sue thereon in his own name; and such two witnesses need not attest the same as subscribing witnesses, and therefore the absence of the usual attestation subscribed by them is immaterial. (*g*) But the action on a bail bond cannot be commenced until after it has been forfeited by the neglect to put in or perfect bail in due time. (*h*)

(*d*) See Jervis's Rules, 48, note (*y*).

(*e*) *Ante*, 371; *Grant v. Gibbs*, 1 Harrison & Hodges' New Term Rep. C.P. 56.

(*f*) Reg. Gen. Hil. T. 2 W. 4, r. 30; Jervis's Rules, 50, note (*e*).

(*g*) *Phillips v. Barlow*, 6 Car. & P. 781.

(*h*) *Alston v. Underhill*, 2 Dowl. 26; *ante*, 371.

CHAP. VIII.
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ON
BAIL BOND.

If bail above be not put in or perfected in due time, the plaintiff has an absolute right to an assignment of the bail-bond, and may support an action in his own name for the breach of the condition in the Court in which the writ of *capias* was returnable, (*k*) or the sheriff, by a recent rule, for his indemnification, may support an action on the bail-bond against the obligors *in any Court*. (*l*)

If the condition of a bail-bond have become forfeited, and an action be brought thereon, the Courts will nevertheless, under circumstances and upon just terms, stay the proceedings, so as to afford the original defendant an opportunity of trying on the *merits*. (*m*) In the King's Bench and Common Pleas an affidavit is by express rule required when the application is by or on the behalf of the *original defendant* that he has a good defence on the *merits*; and if the application be at the instance of the *bail*, then it must be sworn that they make the application at their *own* expense and for his or their indemnity only, and without collusion with the original defendant; (*n*) and the same rule requires a similar affidavit that the application is on behalf of the sheriff or his officer without collusion. (*n*) But the present practice of the Exchequer is not so strict, there not being in that Court an express rule as in the King's Bench, and there a trial of the original action may be obtained on payment of costs without any affidavit of merits or shewing on whose behalf the application is made. (*o*) In no case before the 2 W. 4, c. 39, was the bail-bond to stand as a security, unless the plaintiff had expedited the proceedings by declaring *de bene esse*, (*p*) and as respects the term "*losing a trial*," it imports not only when a trial but also a judgment in or after the same term in which the process was returnable has been lost or delayed, or if returnable in vacation, of the next term, or the bail-bond was not to stand as a security. (*q*)

But the express general rule of Hilary T. 2 W. 4, reg. V., is now very explicit upon the question of *losing a trial*, for it

(*k*) 4 Ann. c. 16, s. 20; Chitty's Col. Stat. 87; see a form of declaration in Tidd's Supplement, A.D. 1833, p. 291, on a bail-bond executed on a *capias* on 2 W. 4, c. 39, and T. Chitty's Forms, 2d ed. but perhaps more lengthily than essential. The declaration need not aver the day of the arrest, *Evans v. Moseley*, 4 Tyr. 172; and 1 Crom. & M. 490.

(*l*) Gen. Reg. Hil. T. 2 W. 4, r. 28; Jervis's Rules, 49.

(*m*) 4 Ann. c. 16, s. 20; Reg. Gen. Hil. T. 2 W. 4, r. 29, 30; Jervis's Rules, 49.

(*n*) 2 Bar. & Ald. 240. N. B. The rule, as there presented, omits one or two material words. See the MS. rule at the Clerk of the Rules.

(*o*) *Bourne v. Walker*, 2 Crom. & M. 338; *Call v. Thelwall*, Exch. 21 January, 1835, Tyrwhitt's MS.; but see *Weston v. Wood*, Mich. T. per Lord Lyndhurst, C. B.

(*p*) Rule Gen. Hil. 2 W. 4, r. 5; Jervis's Rules, 73, 74; 2 Tyr. 351; *Bullivant v. Morris*, 3 Tyr. 820; *The King v. Middlesex*, 3 Dowl. 194.

(*q*) *Bevan v. Knight*, 1 Tyr. 420.

orders (r) that upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting the bail above, the attachment or bail-bond shall stand as a security, *if the plaintiff shall have declared de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, *in a town cause in the term next after that in which the writ is returnable*, and in a country cause at the ensuing assizes.

By the express general rule of Hilary term, 2 W. 4, r. 29, it was ordered, that in all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it; and by the following rule 30, it was ordered, that proceedings (s) on the bail-bond may be stayed on payment of costs in *one action*, unless sufficient reason be shewn for proceeding in more; before which rule there had been a contrariety in the opinion of the judges. (t) By another express rule it was recently ordered, that a plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant, which put an end to the previous vexatious double and concurrent proceedings. (u)

PROCEEDINGS AGAINST THE SHERIFF.

If the defendant make default in putting in or perfecting bail above in due time, then the sheriff, although he bona fide took a bail-bond, with two sureties, whom he had just reason at the time to think sufficient, is liable to certain proceedings, not indeed to an action for taking an insufficient bail-bond, or a bail-bond with insufficient sureties, but he may be proceeded against, first, by *ruling* him to return the writ of *capias*, and if he return *cepi corpus*, he may then be *ruled* to bring in the body, and unless the defendant then in due time put in and perfect bail, or be rendered, the sheriff is liable to an *attachment* for not bringing the defendant into Court, and this, *although in truth he has in all respects performed his duty*. This may appear to be an unreasonable liability to impose upon a public officer. It proceeds upon the supposition that the sheriff, by his officers, may readily ascertain the solvency of the sureties, and he may always resort to them for

(r) And see Jervis's Rules, 73, 74,
note (l); see Chitty's Addenda, 35.
(s) See Jervis's Rules, 49, note (d).

(t) Jervis's Rules, 50, note (e).
(u) Reg. Gen. Hil. T. 2 W. 4, r.
Jervis's Rules, 48, note (x).

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indemnification, and that if he were not absolutely liable for the defendant's putting in sufficient bail, or for the defendant's rendering himself shortly after the time of making the arrest, there would be great facilities to collusion between the officer and the defendant, who, unless the sheriff were absolutely liable, would for a trifling douceur be induced to take any description of bail, though secretly known to him to be in insolvent circumstances. There have, however, of late been attempts to qualify this liability of a sheriff, though hitherto without success. In general, as regards other parts of the office of sheriff, if he perform his duty faithfully to the utmost of his power, he is free from risk, as if upon granting replevin, two sureties, pursuant to the statute, are tendered, and the officer make due inquiries into their *then existing* supposed solvency, and being reasonably satisfied thereupon, grant replevin and deliver the goods distrained to the party applying for replevy, he can only be sued for not taking sufficient sureties, and if on the trial of the action a jury be satisfied that the sheriff and his officers performed their duty in making all requisite inquiries, he will succeed in his defence, although it appear that from change of circumstances or disclosure of facts before concealed, the sureties have since become insolvent.^(v) But the law is not thus qualified as regards the sheriff's liability for the party arrested putting in and perfecting bail above or rendering; for on the one hand he is, under the 23 H. 6, liable to a special action on the case for refusing to accept a bail-bond, when tendered to be executed by two sureties, *apparently* having sufficient within his county, and for continuing the defendant in custody;^(x) whilst on the other, if he bona fide take such a bail bond, and it should turn out that the defendant and the sureties were at the time or have afterwards become insolvent, he will nevertheless be liable to pay the debt and costs, in case bail above be not perfected or the defendant rendered in due time. As however bail above must now be put in within eight days after the arrest, and if a bail-bond be tendered and executed, bail above must be put in within eight days, and justify very shortly afterwards, it can but rarely happen that a sheriff will be seriously prejudiced by a sudden change in the circumstances of both the bail.

The course of proceedings to fix the sheriff with liability to pay the debt and costs, in consequence of bail above not

The course of proceeding to fix the sheriff with liability.

(v) *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27, S. C.; *Sutton v. Wait*, 8 J. B. Moore, 27; 1 Saund. 195.

(x) *Ante*, 363, 364.

having been put in or justified in due time, is by obtaining a rule from the *Court* in term time, or from a *Judge in vacation*, requiring the sheriff to *return the writ* of *capias*. (y) Then there should be an *affidavit* of the search at the proper office for the return and of the result. Next a *rule or judge's order*, requiring the sheriff, when he has returned *cepi corpus*, to *bring in the body*. (z) Then an affidavit of the service of such rule or order, and of the disobedience thereof, and if either of those rules or orders has been disobeyed, then there should be a motion for and a rule obtained for an *attachment*. (a) Upon which the sheriff must either pay the debt and costs, or must, upon affidavit of facts, obtain a rule nisi for staying proceedings upon the attachment, which will, under circumstances or upon terms, be granted, sometimes absolutely on payment of costs, where bail above have been put in and perfected, although not in due time; or conditionally to let in a trial on the merits, the attachment to stand as a security, as in cases where the plaintiff has declared *de bene esse*, and took a part, the import of which term, we have seen, is now fixed by the general rule of Hil. term, 2 W. 4, reg. V. (b)

The proceedings on a bail-bond, or against the sheriff, are so collateral to the principal suit, that it is considered preferable here merely to give this outline of the subject, reserving the full practical detail until the last part of this work.

(y) *Ante*, 246 to 250.
(z) *Id. ibid.*

(a) *Ante*, 247.
(b) See the rule, *ante*, 388, 389.

CHAPTER IX.

OF THE WRIT OF DETAINER, AND PROCEEDINGS THEREON.

CHAP. IX.
WRIT OF
DETAINDER.

WHEN the defendant is already in the *legal* custody of the Marshal of the Marshalsea, i. e. in the King's Bench Prison, (being the prison of the Court of K. B.) or in the custody of the Warden of the Fleet, (being the Fleet Prison and the prison of the Courts of Common Pleas and Exchequer,) the proper course is to issue a *writ of Detainer*, in the form and manner prescribed by the 2 W. 4, c. 39, s. 8, and schedule No. 5. (a) And it has been determined that a plaintiff may issue a writ of Detainer from and returnable in the Court of Common Pleas, directed to the Marshal of the King's Bench; (b) or a writ of detainer may be issued from the Court of King's Bench and returnable in that Court, directed to the Warden of the Fleet Prison; and it is not necessary in either case to bring up the prisoner by habeas corpus into the Court from which the writ issued, in order to charge him with a declaration. (c) It has been suggested that where there are two defendants in a joint action, one of whom is at large and the other is in custody of the Marshal of the King's Bench or Warden of the Fleet Prison, it may be necessary to issue two writs of different descriptions, one of summons or *capias* against the defendant who is at large, and the other of *detainer* against the defendant who is in custody, (d) naming all the defendants in each writ; but where one of several defendants is in the custody of a *sheriff*, then, if he is to be held to bail, a *joint capias* would be proper. The writ must be duly directed to the marshal or warden by the proper description, and where a writ of detainer was directed "to the Marshal of our prison of the Marshalsea," instead of "the Marshal of the Marshalsea of our Court before

(a) See form, *ante*, 156.(b) *Millard v. Millman*, 3 Moore & S. 63; 2 Dowl. 723, S. C.(c) *Barret v. Harris*, 2 Dowl. 186; 6 Legal Observer, 236, S. C.

(d) Tidd's Supp. 1833, p. 68.

us," the defendant was discharged out of custody, (e) on account of the doubt whether the intended officer was the gaoler of the Palace Court, or that of the proper King's Bench Prison. (e)

If the existing imprisonment has been occasioned by *illegal* process or proceeding of the *same plaintiff*, and not of a third person, a writ of detainer at his suit would be inoperative, (f) and in that case a *capias* should be issued, and an arrest take place at a time and under circumstances that would be clearly legal. (g) Where a *sheriff* has *arrested* a defendant by an illegal act or contrivance of *his officer* in one action, *he* cannot detain him in another; (h) nor can a defendant who has been just discharged by a judge from an illegal writ be arrested as he was returning. (i) But in the former case a material distinction exists as to the *nature of the illegality*. When the *same plaintiff* has caused an arrest upon an affidavit or writ so defective as to entitle the defendant to his discharge, then, as he ought not to be at liberty to avail himself of any irregularity for which he is responsible, the defendant would be equally entitled to his discharge from any detainer or other process at the suit of the *same plaintiff*, though not from a detainer at the suit of a third person not in collusion with the first plaintiff, (k) or where the first process was irregular. (k) But where the first arrest has been occasioned by the illegal act, fraud or contrivance of the *sheriff* or *his officer*, then the defendant would be entitled to his discharge, not only from the first process, but also from every detainer or process of *every third person*, though the latter were free from imputation of fraud or contrivance. (k)

The statute 2 W. 4, c. 39, s. 8, we have seen, (l) prescribes that the *declaration* upon process to *detain* a prisoner in King's Bench or Fleet Prison, "shall and may" allege the prisoner to be in the custody of the *marshal* or *warden*, as the fact may be, and the proceedings shall be as against prisoners in the custody of the *sheriff*, unless otherwise ordered by some rule to be made by the judges of the said Courts; (l) and the

Declaration on
a writ of de-
tainer.

(e) *Stor v. Mount*, 2 Dowl. 417; 7 Legal Observer, 301, S. C.; ante, 187.

(f) *Rose v. Tomblinson*, 3 Dowl. 55, 56; ante, 355, 356.

(g) And see ante, 335, 356.

(h) *Barratt v. Price*, 9 Bing. 566;

1 Dowl. 725; ante, 355, 256.

(i) *Rex v. Blake*, 2 Nev. & Man. 312.

(k) *Barratt v. Price*, 9 Bing. 566; 1 Dowl. 725; 1 Clitty's Rep. 579, and cases there cited; ante, 355, 356.

(l) Ante, 151, 152, in note.

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General Rule of M. T. 3 W. 4, prescribes the precise form of commencement of a declaration against a prisoner in custody of the marshal or warden. But the allegation in the commencement of a declaration that the defendant was *detained* in the custody of *the sheriff*, is not traversable by a plea in bar, and on demurrer such a plea was holden bad. (m)

(m) *Rea v. Kingston*, M.T. 1834, Exch., 9 Legal Observer, 110.

CHAPTER X.

PROCEEDINGS AGAINST A MEMBER OF PARLIAMENT, A TRADER,
UNDER 6 GEO. 4, c. 16, s. 10.

IN general the mesne process against a *Member of Parliament* who is privileged from arrest, is to be by the *ordinary writ of summons*, prescribed by 2 W. 4, c. 39, s. 1, the same as if he were an unprivileged person, and without even the necessity for describing him in the writ to be a member of parliament or esquire, excepting voluntary courtesy. But if the defendant be a member of parliament and also a *trader*, then the general *bankrupt act*, 6 G. 4, c. 16, s. 10, enacts, that if a creditor file an *affidavit* of the requisite debt, viz. in case of a single creditor a debt of £100 or upwards, and that the defendant was according to his belief a *trader*, and issue a summons, and personally serve the defendant with a copy, and the defendant do not within one calendar month after such service pay the debt or secure the same, or enter into a bond with two sureties to pay the condemnation money and costs in such action, and within such calendar month cause an appearance to be entered, then every such trader shall be *deemed to have committed an act of bankruptcy* from the time of the service of such summons; and any creditor to the requisite amount may issue and prosecute a commission of bankrupt against such trader. As the 2 W. 4, c. 39, abolishes all prior process, and amongst others the summons mentioned in the above act, it became necessary to substitute a new proceeding in lieu, and accordingly we find that sect. 9 and schedule No. 6, prescribe the new form of proceeding.^(a) As this new proceeding against a member of parliament when a *trader* is not of very frequent occurrence, it must here suffice to refer to Mr. Tidd's work for further information relative to the exact course of proceeding in such a case.^(b)

CHAP. X.
OF THE WRIT
OF SUMMONS
AGAINST AN
M. P.

Writ of summons against a member of parliament to enforce provisions of 6 G. 4, c. 16, s. 10.

(a) *Ante*, 156, note, for the mode of proceeding and form of writ. The form of *præcipe* for such writ, and of the writ itself, are also stated in Tidd's Supp. A.D. 1833, p. 263, 264.

(b) See Tidd's Supp. 1833, p. 75, 76.

CHAPTER XI.

PROCEEDINGS TO OUTLAWRY ON MESNE PROCESS.

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CHAP. XI.
PROCEEDINGS
TO OUTLAWRY
IN GENERAL.(a)

Introductory
observations.

WE have seen that although it is a maxim in law that a party should not be *concluded* by a final judgment unheard, (b) yet that, if owing a debt in this country he keep out of the way, or be absent from the kingdom to avoid process requiring him to appear and shew cause why he does not pay such debt, it is but reasonable that he should be placed under such disability with respect to any of his British rights as to induce him to appear and enable a plaintiff to proceed in his action. It is on this principle that the custom of foreign attachment in London, viz. of seizing goods in the possession of a third person where the debt is due from him there to the debtor, whether in England or abroad, is valid, so that the goods or credits of a debtor may be vested in the plaintiff, unless the debtor appear and defend within a year and a day. (c) And, on the same principle, *process to outlawry* may be issued against a debtor, upon which he is at five several county Courts or Hustings publicly called, exacted or *proclaimed*; and it being presumed that he has heard of the proceedings, he may be *outlawed* for his contumacious disrespect of the legal process of the Court. And although the outlawry of a defendant who has previously left the kingdom, although for the very purpose of delay, may be set aside by the outlawed defendant by writ of error, or even on motion, (d) yet its effect

(a) See the former law and practice as to outlawry (most of which is still applicable) clearly stated in Tidd, 9th ed. 128 to 145; and the practice as recently altered, 2 Arch. Fr. K. B. by T. Chitty, 3d ed. 702 to 713; 4th ed. 795 to 807. It has been held that a writ of exigent is not a writ within the 12th section of the

uniformity of process act, which only relates to the new process thereby created, *Lewis v. Davison*, 3 Dowl. 272.

(b) *Ante*, 141; and per Bayley, J. in *Williams v. Bagot*, 3 B. & C. 786.

(c) *Turbill's case*, 1 Saund. 67, and notes.

(d) *Bryan v. Wagstaff*, 5 B. & C. 314.

cannot be avoided by another defendant, (e) nor even by the outlawed defendant, *except upon the terms of his appearing to a new action*, either by entering a common appearance when no affidavit of debt has been made, or of perfecting bail where there is an affidavit of debt. (f) And in a late case, where a debtor obtained a rule nisi for setting aside proceedings to outlawry, on the ground that the plaintiff had outlawed him when he knew he was in America, and also on the ground that the plaintiff had at the same time taken proceedings against him in America, where he was arrested, and had taken the benefit of the insolvent act there, the Court (it being sworn on the part of the plaintiff in the action that the debtor went abroad to avoid his creditors) refused to make the rule absolute, except on the terms of the debtor's paying all the costs and putting in bail or rendering, saying, that if the discharge in America afforded any defence at all, the facts might be pleaded. (g) And it seems that even a discharge from debts under an insolvent act does not relieve the defendant from the consequences of his contumacy, or entitle him to have his outlawry set aside. (h).

The 2 W. 4, c. 39, s. 5, contains an express provision authorizing *more expeditious and less expensive proceedings to outlawry* than previously prevailed, and which will be presently noticed. Before that act, in case of a *joint contract*, if one or more of several co-contractors, who ought to be jointly sued, effectually avoided service or execution of process, either by secreting himself, or by leaving the kingdom, the usual course was to commence an action by *original writ* against all the parties, and after the sheriff had returned non est inventus as to the party who could not be served or arrested upon an alias and pluries capias founded upon such original writ, a writ of *exigent* and writs of proclamation issued against him, and after several successive proceedings, and much expense and delay, he was *outlawed*; and not until after such dilatory proceedings could the plaintiff declare and proceed in the action separately against the other defendants who had appeared or perfected bail, (i) and they could not interfere to set aside or impeach the outlawry of their co-defendant on account of any irregularity or

The improved
and more expeditious proceed-
ings to outlawry.

(e) Post, 405; 31 Eliz. c. 3, s. 3; 2 Salk. 496; Tidd, 140, 141.

(f) 3 Bla. Com. 284.

(g) Probert v. Rogers, 3 Dowl. 170.

(h) Dickson v. Baker, 3 Nev. & Man. 775; 2 Arch. K. B. 4th ed. 800, n. (l); sed vide Rex v. Castleman, 4 Burr. 2119,

2127, post, 405.

(i) Haigh v. Conway, 15 East, 1; Goldsmith v. Levy, 4 Taunt. 299; Fort v. Oliver, 1 Mau. & Sel. 242; Sanderson v. Hudson, 3 East, 144; Machmichael v. Johnson, 7 East, 50.

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of his absence beyond sea; (*k*) and whereupon the plaintiff in the action might obtain a judgment separately against the ~~sewed~~ or arrested defendants. And he might also obtain satisfaction of his debt and costs from the outlaw's effects by application to the Court of Exchequer; or if above £50, by petition. (*l*) And although such outlaw might on motion, or by writ of error, reverse the outlawry, supposing there were any irregularity or error in the proceedings to outlawry, and he might of *right* do so if he were beyond sea at the time the writ of exigent was awarded, although he went abroad on purpose to avoid the payment of his just debts, (*m*) yet he could do so *only on terms*, i. e. on entering an appearance, or on perfecting bail in a new action against him separately for the debt or cause of action. (*n*) So that although the outlawry were illegal or erroneous, still it operated as a mode of compelling the defendant to appear and put in bail according to the nature of the original claim, whether or not bailable, and thus ultimately enable the plaintiff to proceed to judgment and execution in an action against the outlawed defendant; and the Court might even require bail although no affidavit of the debt had originally been made. (*o*) The same practice of outlawing one of several defendants in substance, continues, although the 2 W. 4, c. 39, s. 5, renders the process and proceeding more expeditious and less expensive, especially by repealing the necessity for issuing an original writ, or any alias or pluries capias, (*p*) and by rendering it sufficient in non-bailable actions to issue a writ of summons, and a writ of distringas returned nulla bona and non est inventus; and in bailable actions, one writ of capias returned non est inventus, immediately after which the exigent and writ of proclamation may be issued. (*q*)

The necessity for proceeding to outlawry against one of several defendants when abroad, removed by 3 & 4 W. 4, c. 42, s. 7.

As regards *joint* claims upon *several* defendants, the necessity for including in the writ all co-contractors who are *within the jurisdiction* of the Court still continues, (unless where a party has obtained his certificate as a bankrupt, or his discharge under an insolvent act, who then may be omitted); (*r*) but if one or more of them be abroad, or *out of the jurisdiction*, the 3 & 4 W. 4, c. 42, s. 7, enacts, that no plea in abatement

(*k*) *Synends v. Parminter*, 1 Bla. Rep. 20.

(*l*) Tidd, 138.

(*m*) *Bryan v. Wagstaffe*, 5 Bar. & Cres. 314.

(*n*) 31 Eliz. c. 3, s. 3; 2 Salk. 496; *Serecold v. Hampson*, 2 Stra. 1178; 1 Wils. 3; 12 East, 624, a note; and see the lucid statement, Tidd, 140, 141.

(*o*) *Id. ibid.*; Fortes. 89, and Tidd, 136; 3 Burr. 1482; Barnes, 322.

(*p*) See the terms of s. 5, 3 W. 4, c. 39; and yet in *Probert v. Rogers*, 3 Dowl. 170, it appears there were an alias and pluries capias.

(*q*) 2 W. 4, c. 39, s. 5.

(*r*) 3 & 4 W. 4, c. 42, s. 9.

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for the non-joinder of any person as a co-defendant shall be allowed in any Court of Common Law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. The effect of this enactment is, that where one of *several* co-contractors is *abroad*, it is no longer *absolutely necessary* for a plaintiff to proceed to outlawry against him, but he *may* in the first instance proceed against those who are within the jurisdiction. But still it must be kept in view, that if the party abroad have property in England, it may be most important, with a view to actual satisfaction of the debt, to include him in the action, and to proceed to outlawry against him, in the first instance, especially as under 2 W. 4, c. 39, such proceedings are not now so expensive or dilatory as heretofore; and therefore, in concluding this division of the subject, we will distinctly consider the course of proceeding to outlawry against one of several defendants.

The 2 W. 4, c. 39, s. 5, we have seen, (s) authorizes proceedings to outlawry as well in actions commenced by a serviceable writ of summons as by aailable writ of *capias*, and extends to the outlawry of a *single* defendant as well as of one of several. Before that act, as no original writ was returnable in *the Court of Exchequer*, no proceedings to outlawry were sustainable in that Court; but the 2 W. 4, c. 39, s. 5, dispenses with, and indeed abolishes original writs, and as all the Courts alike authorize an outlawry founded on a preceding writ of *distringas*, or of *capias*, (t) and the same act, s. 7, and 2 & 3 W. 4, c. 110, s. 1, 4, 9, contain enactments relative to the proper officers to execute the duties of filacer, exigenter, and clerk of the outlawries in that Court. (t) The enactment is, "That upon the return of *non est inventus* as to any defendant against whom a writ of *capias* has issued, and of *non est inventus and nulla bona* as to any defendant against whom a writ of *distringas* has been issued, whether such writs shall have issued against such defendant alone, or against him and any other person or persons, it shall be lawful to proceed to outlaw or waive such defendant by writs of *exigi facias and proclamation*, and otherwise in such and the like manner as might then be lawfully done, upon the return of *non est inventus* to a pluries writ of *capias* issued after an original writ;" and the act then provides for the re-

The substance of the practice in proceedings to outlawry as altered by 2 W. 4, c. 39, s. 5.

(s) *Ante*, 151.

(t) See observations in Tidd's Supp. 1833, p. 100.

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turn and teste of the writ of exigent and proclamation.(u) So that the effect of this enactment was to dispense with the antecedent necessity for commencing the proceedings to outlawry by an *original writ*, and also to dispense with the necessity for an *alias* and *pluries* writ of *capias*. But the concluding part of the fifth section makes a distinction between writs of *distringas* and *capias* issued for ordinary purposes, and those when issued for outlawry, by requiring more time in the latter case, viz. absolutely *fifteen days* after the delivery thereof to the sheriff and the time of the return thereof; and this, no doubt, with the view of affording more time and opportunity for the defendant to hear of the proceeding, and by appearing, to guard against the consequences of his neglect; and hence the enactment affords a presumption that it was intended by the legislature that the sheriff and his officers should endeavour *actually* to execute the writ by service or arrest, and that it would be irregular, if the defendant be known to be in England, or to have an attorney there, to instruct the sheriff to keep the process secret, and still more so, under those circumstances, expressly to require him to return *non est inventus*.(x) In a late case, where the plaintiff's attorney knew the defendant's attorney, and delivered a *capias* to the sheriff, with directions to return the same *non est inventus*, the Court thought this proceeding, without making any application to the defendant's attorney, was an abuse of the process of the Court, made absolute a rule for setting aside the outlawry with costs.(y) The practice has been stated to be, for the plaintiff or his attorney to go before a judge with an affidavit that the defendant cannot be found, and that then the judge will give leave to return the *capias non est inventus*.(z) But the concluding part of section 5 expressly enacts, that at least fifteen days shall intervene between the delivery of the *capias* to the sheriff and his return thereof.

The present practice in proceeding to outlawry when the process is serviceable.

If the process is to be serviceable, the practice is to issue a writ of *summons* as in ordinary cases, and as before described.(a) We have seen that when it is intended to obtain a *distringas*, and proceed to outlawry against a single defendant, or one of several, the modes of attempting to serve the defendant personally must be open and candid, by making three several calls

(u) See the statute, *ante*, 151, in note.

(x) *Pigou v. Drummond*, 1 Bing. N.C. 354; and see observations in *Lewis v. Davison*, 3 Dowl. 275. But see 2 Arch. K. B. 3d edit, 703; *id.* 4th edit. 797.

(y) *Pigou v. Drummond*, 1 Bing. N.C. 354.

(z) *Lewis v. Davison*, 3 Dowl. 375, *quære*.
(a) *Ante*, 235 to 260; and *ante*, 298 to 305.

at the defendant's residence, if any, stating the object of the call, and there leaving a copy of the writ of summons and indorsements on the last call. (q) We have also seen what are the requisites of the affidavit and the other proceedings to obtain a writ of *distringas*, which must be returnable in term, on a day certain; and the fifth section of 2 W. 4, c. 39, requires that it shall be delivered to the sheriff at least fifteen days before he returns it.

The form of *affidavit*, in order to obtain a *distringas* preceding *outlawry*, materially differs from that when the Court or judge is to be required to issue a *distringas* with the view of enabling the plaintiff to enter an *appearance* according to the statute; and in the latter case more particularity is required than when the proceedings are to outlaw the defendant, because in proceedings to outlaw the defendant when he keeps out of the way, or is abroad, it would be useless to endeavour to see him. (r) The former affidavit states facts from which it is to be inferred that the defendant *is* in England, and has intimation of the process, whilst the latter shews that he *is absent, and probably has no knowledge of the process*, but is *generally* contumacious as to all process by wilfully being out of the way, and states that the party has not been nor can be found to be served with a copy of the writ of summons, and shews, if the fact, that *it is known he is abroad*, as well as that he has *not any distrainable property*; (s) and *it may omit* the statement of the repeated calls, and other formalities required to be sworn to in cases when it cannot be sworn that the defendant has absconded or left the kingdom. (t) On moving for the *distringas* also, the counsel must declare his election for what purpose he requires the *distringas*, viz. in order to proceed to outlawry, and not that the plaintiff may enter an *appearance* according to the statute; and the *distringas* must particularly intimate the intention to proceed to outlawry, and cannot be framed in the alternative. (u) The subscribed form of affidavit has been suggested as proper in such a case, but must of course vary according to circumstances. (x)

(q) *Ante*, 302 to 365.

Bing 464.

(r) *Reuth v. Mellor*, 3 Tyr. 822; *Jones v. Price*, 2 Dowl. 42.(t) *Price's Gen. Prac.* 88, 89.(s) *Price's Gen. Prac.* 51, 52, 58; and see *id.* 53, 54, note *; *Fraser v. Case*, 9(u) *Fraser v. Case*, 9 Bing. 464; *Price's Gen. Prac.* 53, *ante*, 309.(x) *Price's Gen. Prac.* 89.

In the Court of King's Bench, [or Common Pleas, or Exchequer of Pleas.]

Between { [Plaintiff's name], Plaintiff,
and
[Defendant's name], Defendant.

[Deponent's name], clerk to [name of plaintiff's attorney], of [address], attorney for the above-named plaintiff in this cause, maketh oath and saith that he this deponent did

Form of affidavit of one call, and service of copy of summons on defendant's wife,

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It has been suggested that in the affidavit the intention to proceed to outlawry should be stated. (y)

The writ of *distringas* thereupon obtained is usually to be directed to the sheriffs of London, because the sheriffs' hustings, at which the defendant may be exacted or called to appear on the subsequent exigent, are there held every fortnight, whilst in other counties the County Courts are only holden every month. The 2 W. 4, c. 39, s. 5, we have seen, requires that fifteen days shall clapse between the *delivery* of the writ of *distringas* to the sheriff and his return. After his return in the conjunctive of *nulla bona* and *non est inventus*, the *writ of exigi facias* and other proceedings take place. Writs of *distringas* are signed and sealed, and issued from the same offices of the respective Courts as the writ of summons, (z) and the same fees are payable. (a)

Writs of exigent
and proclamation
existed before.

It is to be observed that writs of *exigent* and *proclamation* existed before, and are not founded on the uniformity of process act, 2 W. 4, c. 39, and therefore the 12th section of that act, as respects the *teste* of an exigent or proclamation, does not extend to writs of exigent. The 5th section, however, pro-

and the ab-
sence of defend-
ant, in order to
obtain a dis-
tringas and
proceed to
outlawry.

on the — day of [month], instant, [or "last,"] go to the dwelling-house and residence of the above-named defendant, being No. — [street, &c.] in the county of Middlesex, [or "situate at," &c.] for the purpose of serving the defendant personally with a writ of summons, "which appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court against the said defendant, at the suit of the said plaintiff in this cause, on the — day of [month], instant, [or "last,"] and this deponent saith that he then saw there a person who informed him that she was the wife of the said defendant, and which information this deponent verily believes to be true; and this deponent saith that he did thereupon inquire of her if the said defendant, her husband, was at home, and that she thereupon immediately said he was not; and that this deponent then shewed her the said writ and copy, and thereupon informed her that he had called for the purpose of serving the said writ, by delivering to her husband the defendant in person therein named, the said copy so as aforesaid then produced and shewn to her; and that it was a writ of summons issued out of the Court of —, at the suit of [plaintiff's name], the plaintiff, to compel his the defendant's appearance thereto in the said Court. And thereupon this deponent saith that the defendant's said wife then told him this deponent that it would be of no use to seek her husband for the purpose of serving him with process, because he had withdrawn himself for the purpose of avoiding proceedings at law at the suit of his creditors, and that he was then absent, and would remain from home until he could make some arrangement with them; and this deponent believes the said communication and information of the said defendant's wife to be true; and the deponent saith that he thereupon left the said copy of the said writ of summons with the said defendant's said wife, at his said dwelling-house; and this deponent further saith, that such copy had then thereupon all the indorsements that are required to be made thereon by the statute and rules of the Courts in such case made and provided; and he saith that he did on the — day of [month], instant, [or "last,"] indorse on the said writ the day of the week and month, and the year of the service thereof; and this deponent further saith that he did on the — day of —, [or "instant,"] carefully make search in the proper office of this Court, and that he there found that no appearance was then entered to the aforesaid writ of summons by or on the part of the said defendant.

Sworn, &c.

(y) Atherton on Personal Actions, 61,
62, 139, 140, *sed quare*.

(z) Price's Gen. Prac. 59.
(a) Rule Mich. T. 3 W. 4.

vides that the teste of the exigent and writ of proclamation shall be regulated as therein mentioned, by the return of the previous *capias*, &c. (b) As respects the *writ of proclamation*, it has been recently held that a writ directing the proclamation to be made at the *parish church* is sufficient, though the act says “*nearest church or chapel*,” it not appearing by affidavit that there was any nearer church or chapel. (c) For the same reason also, it should seem that the several *indorsements* required on writs issued by authority of 2 W. 4, c. 39, and by rules Hil. T. 2 W. 4, and Mich. T. 3 W. 4, are not requisite on an exigent or writ of proclamation. (d) It seems also from a recent decision, that as the writ of exigent and other proceedings are filed, and accessible to search by a defendant, he is bound to search and object to any irregularity in either writ within a reasonable time, although he may not in fact have had any intimation of the outlawry until after it had been completed. (e)

In *bailable* actions no *distringas* is required, and the *writ of capias*, with the foregoing *indorsements*, is to be issued into the county in which the outlawry is intended to be completed; and usually, for the above reason, the *capias* is directed to the sheriffs of *London*, and who should execute the same if the defendant can be found; and it would be improper and irregular to instruct him to return the writ *non est inventus* when the party is known to be in the kingdom, and that he might by due enquiry be arrested; (g) though when the defendant is abroad, it is usual to obtain leave of a judge to have the writ speedily returned *non est inventus*; (h) or even without such leave, to *indorse* on the *capias*, “The sheriffs are requested not to execute this writ, but at the expiration of fifteen days after the date thereof to make a return of *non est inventus* for outlawry proceedings. G. H. 24th Decem. 1834.” (i) But the circumstance of the defendant’s having constantly appeared in public during the proceedings to outlawry would not invalidate them, unless perhaps he swear that he had no intimation of them; (j) and the sheriff is not to return the writ until fifteen days have expired after he *received* it. (k) No *alias* or *pluries*

The practice
when process
bailable. (f)

(b) *Lewis v. Davison*, 3 Dowl. 272.

(c) *Id. ibid.*

(d) *Id. ibid.*; ante, 152, 160; but see post, 404, note (o).

(e) *Id. ibid.*

(f) See per tot. *Lewis v. Davison*, 3

Dowl. 272.

(g) *Ante*, 400.

(h) *Ante*, 400, note (c).

(i) See Arch. K. B. 4th edit. 797.

(j) *Johnson v. Driver*, 1 Dowl. 127.

(k) 2 W. 4, c. 39, s. 5.

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writ of capias are required; (*k*) but on the return of non est inventus, a writ of exigi facias may be issued on the day of the sheriff's return of the capias; and it seems that the proper *teste* of the writ of exigent is the day on which the sheriff made his return to the writ of capias. (*l*) Such writ of exigent must be *returnable* on a day *certain in term*, and should have so long a time between its *teste* and delivery to the sheriff and the return day as to allow at least five County Courts, (holden monthly,) or in London five hustings, holden every fortnight, to intervene, (*m*) for otherwise it would become necessary to issue an *allocatur exigent*, so as to make up the requisite number of callings and proclamations. A bailable writ of exigent should be *indorsed* in all respects as a capias, and if it be issued in an action for a *debt*, it should be indorsed with the amount of the claim for the debt and costs; (*n*) and where a defendant was arrested on an exigent which was not so indorsed, a bail-bond executed by him was recently ordered to be cancelled on entering a common appearance. (*o*) At the time of issuing the exigent, a *writ of proclamation*, requiring the sheriff to make three proclamations in pursuance of 31 Eliz. c. 3, should also be sued out.

Proceedings to outlawry in a joint action where one is a prisoner.

In a bailable action against *several* defendants, if it should become necessary to outlaw one of them, and one or more of the other defendants is a prisoner in the same action, as it would be irregular to declare separately against him or any other defendant before the outlawry has been completed, and the rule of Trin. T. 3 W. 4, 1833, requires that all prisoners shall be declared against within a certain time, i. e. before the end of the next term after his arrest or detainer, *unless further time to declare be given to the plaintiff by rule of Court or order of a judge*, so as to prevent lengthened imprisonment, it becomes necessary, (*p*) before the limited time has expired, or at least immediately after demand of declaration when necessary, (*q*) to obtain from the Court or a judge time to declare against the prisoner upon shewing the necessity for, and already active diligence in proceeding to outlawry against the absent defendant, (*r*) and which time it should seem a plaintiff in such a case

(*k*) In terms of s. 5, 2 W. 4, c. 39; but in *Roberts v. Rogers*, 3 Dowl. 170, there were an alias and pluries capias.

(*l*) Tidd's Supp. 1833, p. 99, note (*d*).

(*m*) Com. Dig. Pleader, 2 W. 4; and see Tidd, 9th edit. 132, 133; *id.* Supp. 1833, p. 99.

(*n*) *Ante*, 160, in notes.

(*o*) *Gibbon v. Spalding*, 1 March, 1835, coram Bosanquet, J. but see *ante*, 403,

note (*d*).

(*p*) 9 Bar. & Cres. 544; 2 New Rep. 404.

(*q*) Rule Trin. T. 1 W. 4.

(*r*) The terms of a previous rule K. B. R. II. 26 G. 3, Tidd, 360 to 363, to the same effect, differed, as they only required the plaintiff to declare within the limited time, "if by the course of the Court he could so declare."

is entitled to be allowed. (s) In a late case, where in a joint bailable action against several, and one of them (who had represented that the others were his partners in the purchase of the goods for the price of which the action was brought) only had been arrested, and was in prison, the Court of Exchequer, (after intimating that the plaintiff might proceed to outlawry against the defendant who could not be found, and in the meantime detain the arrested defendant, on an affidavit of such facts, and that it was believed the other named defendants were not in existence, in order to prevent the arrested defendant getting out of custody,) gave the plaintiff leave to discontinue without costs, and that the plaintiff should be at liberty to commence a fresh bailable action against the already arrested defendant, he declaring before the end of the term. (t) The circumstance of an outlawed defendant having obtained his complete and unqualified discharge from imprisonment under the bankrupt act, (u) or the insolvent act, 7 G. 4, is no ground for a motion to set aside his outlawry. (x) But in a late case in the Practice Court, a learned judge made a *prospective* order in Hilary term, 1835, that when on a named day in the following vacation, a defendant should have completed his imprisonment under the adjudication in the Insolvent Court, he should be discharged from the outlawry, because otherwise, as all applications to set aside an outlawry must be made *in term time*, the defendant would have to continue in prison until the subsequent Easter term. (y)

The author, in concluding this chapter, desires particularly to have it understood that his observations are to be received as merely *in continuation* of what will be found in prior works, and not as assuming to supply their utility.

(s) Barues, 383; 9 Bar. & Cres. 544; 775; 2 Dowl. 517; *Nicholson v. Nichols*, 2 New Rep. 434; Tidd, 420, 424. 3 Dowl. 326. But see *Waters v. Johnson*,

(t) *Ames v. Ragg and others*, 2 Dowl. 9 Legal Observer, 300.

(u) Tidd, 9th edit. 136; 3 Taunt. 141. (y) *Waters v. Johnson*, Hil. T. 1835,

9 Legal Observer, 300.

(x) *Dickson v. Baker*, 3 Nev. & Man.

CHAPTER XII.

OF PROCESS AND PROCEEDINGS TO SAVE THE STATUTE OF
LIMITATIONS.

CHAP. XII.
Of process and
proceedings to
save a statute of
limitations. (a)

BEFORE the 2 W. 4, c. 39, s. 10, it frequently became necessary to issue process within six years or other limited time after the cause of action accrued, but either on account of the absence of the defendant or of witnesses, or for some other reason, such process was not actually served, but merely returned by the sheriff or under-sheriff *non est inventus*, and then all further proceedings were suspended until a fit opportunity, when an alias or pluries reciting the first process was issued, and such first process was not filed until it became necessary to do so, in support of a replication stating the first and continued process thus returned; and instances occurred even of an under-sheriff having at the request of a plaintiff's attorney, after the lapse of several years, returned *non est inventus* on process long before actually issued, but which had *never been in his possession* until the instant of such return. But the 10th section puts an end to such practice, and after enacting that every writ of summons and *capias* may be *continued* by alias and pluries, expressly provides, that no *first* writ shall be available to prevent the operation of any statute of limitations, *unless* the defendant be *arrested* thereon or *served* therewith, (b) or proceedings to or towards outlawry shall be had thereupon, *or unless such writ and every writ, if any issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof*, (i.e. within the four calendar months during which it is to continue in force,) *and unless every writ issued in continuance of a preceding writ shall be issued*

(a) See Tidd's Supp. 1833, p. 77; and Tidd, 9th ed. 27, 28; and manner of entering on the roll, *id.* 162.

(b) That means *personal* service; and the Court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order

to save the statute of limitations, and consequently every plaintiff must now strictly observe the recent regulations, *Frith v. Lord Donegal*, 2 Dowl. 527; see the present practice fully, Arch. K. B. by T. Chitty, 4th ed. 793.

within one such calendar month after the expiration of the preceding writ, *and shall* contain a memorandum indorsed thereon or subscribed thereto, *specifying the day of the date of the first writ, and return to be made* in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, *by the plaintiff or his attorney* suing out the same. (c) So that it is not now permitted to a plaintiff's attorney, even with the assent of a sheriff or under-sheriff, at any indefinite period, to obtain a return of process to prevent the operation of the statute, but the *first process must be actually returned non est inventus within one calendar month* after the same would expire, and such return must be *entered of record* within the same time; and all continued process thereon must be *promptly* issued and acted upon, or the statute will bar the remedy. (d) The provision in the conclusion of sect. 10, authorizing the *plaintiff or his attorney* to return serviceable process "*non est inventus*," is new, and introduced in consequence of the writ of summons not being addressed to the sheriff or other officer, but merely to the defendant himself, so that the plaintiff or his attorney may execute the same in person, and never employ the sheriff or other officer.

We have seen that when the statute of limitations would otherwise bar any remedy, the Courts will permit the *amendment* of a writ to prevent that result, and for the same reason they have allowed an amendment of the continuances entered, (e) and likewise a writ to be amended if the defect has rendered it merely voidable, but not absolutely void. (f) The process to be issued as well in the first instance as in continuation should in all respects be regular, though we have seen that should it be defective, the Courts will in that, as an excepted case, permit an amendment; and where the writs as entered on the roll on which the continuances were entered appeared to be regular, although it appeared from the writs themselves that the second writ was improperly tested, the Court said, that as the roll was right, they would not look to any thing else to contradict it. (g) The Courts will not allow

(c) See the practice, 2 Arch. K. B. 3d ed. 700, 701; and see the form of Entry and continuances, 2 Chitty's Forms, 636 to 642.

(d) *Nicholson v. Rowe and others*, 2 Crompt. & Mee. 469. But in cases where the issuing and regular continuance of process to save the statute is not required,

an alias or pluries capias may be sued out at any time, *id. ibid.*; ante, 218.

(e) *Taylor v. Gregory*, 2 Barn. & Adol. 257.

(f) 2 Arch. K. B. 3d ed. 701; ante, 235.

(g) *Dickenson v. Tongue*, 1 Crompt. M. & K. 241.

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process to be served at the house of an agent of the defendant out of the jurisdiction in order to save the statute of limitations, but will leave the plaintiff to proceed according to the before stated direction of the 2 W. 4, c. 39, s. 10. (h)

The process to save the statute must be the *proper basis* of the subsequent proceedings, and the form of action must be described therein as the plaintiff would *afterwards declare*. If the proceeding should be by writ of *summons*, then the plaintiff or his attorney must return "non est inventus," and enter the same of record in due time, i. e. within one calendar month after the execution, or four months from the teste. (i) The form of entry of any process in any Court will be found in Mr. Tidd's Supplement of A.D. 1833, (k) and in the recent edition of Mr. T. Chitty's Forms. If it be necessary to *continue* the first writ of summons, then an alias and pluries may be issued into the same or another county; (l) and it is very essential to take care that the *first writ*, whether of summons or *capias*, be in due time returned non est inventus, and that *every continued* process to save the statute of limitations *must* have a *memorandum indorsed or subscribed*, specifying the *date* of the *first writ*, for otherwise by the express terms of 2 W. 4, c. 39, s. 10, no such first writ is to be available to prevent the operation of any statute of limitations. (m) The form of such memorandum as regards an alias or pluries writ of summons may be as subscribed. (n)

(h) *Frith v. Lord Donegal*, 2 Dowl. 527.

(i) See the form of such return, *ante*, 272 note (x).

(k) Page 252 to 255.

(l) See forms Tidd's Supplement, A.D. 1833, p. 264.

(m) Tidd's Supplement, 1833, p. 51, 77 and 265.

Form of memorandum of date of first writ.

(n) "The writ of summons which is continued by this writ was dated the — day of — in the — year of the reign of his present Majesty."

LONDON:

C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

7, Leadenhall Street, Nov. 1834.

THE
ASIATIC JOURNAL
AND
MONTHLY REGISTER
FOR
BRITISH INDIA, CHINA, AND AUSTRALIA.

THE Proprietors of the *ASIATIC JOURNAL*, having repeatedly noticed that a certain degree of misapprehension prevails respecting the nature and objects of this monthly publication, deem it desirable, and by no means unimportant to the community, at a period when our relations with the East are undergoing so material a change in character and extent, that an exposition of the scope and contents of the work should be generally circulated, being fully convinced that many persons have suffered inconvenience through not knowing where information, of which they were in want, may be readily obtained.

Before the appearance of the *ASIATIC JOURNAL*, the affairs of British and Foreign India, as well as of other countries in the East, were known to Europe only by means of the rare and imperfect notices published in the newspapers, which, even at the present day, are too much engrossed with subjects more familiar and of nearer interest, to afford more than occasional glances at affairs of the East. Since this work was set on foot, in the year 1816, it has kept up a constant, connected, and copious supply of oriental information of all kinds, and has become a valuable record of important public documents, statistical information, geographical and archaeological discoveries, and political transactions, in our remote Eastern dependencies and the contiguous territories. With the enlargement of our Indian possessions, and of our relations with the other hemisphere, the *ASIATIC JOURNAL* has kept pace, and is now an organ of communicating to Europe, monthly, a digest of intelligence of every kind,—political, domestic, literary, scientific, and commercial,—from the vast empire of British India, and the insular dependencies of Britain in the East, Ceylon, Singapore, Mauritius, &c.;—the Empires of China and Japan;—the extensive Indo-Chinese and Ultra-Gangetic states of Cochin-China, Siam, and Burmah;—the Malay States;—Central Asia;—Persia;—Turkey and Egypt;—Dutch, French, Spanish, and Portuguese India;—the Cape of Good Hope;—Australasia and Polynesia. At a vast expense, files of public journals, from all the countries just enumerated where such publications exist, are transmitted, exclusively for the use of the *JOURNAL*, by the most expeditious channels

which the extensive connexions and peculiar facilities of the proprietors and publishers enable them to command ; and a digest of Asiatic Intelligence, brought down to the last moment, occupying from fifty to seventy closely-printed pages, carefully condensed and arranged, is published every month. It is well known that Eastern papers are rarely to be met with in England, and, were they accessible, their bulk would preclude their examination by most persons.

This feature constitutes, however, but one province or department of the *ASIATIC JOURNAL*. It is, moreover, a popular miscellany, containing nearly one hundred pages of original literary and scientific matter, contributed by able pens in England, on the Continent of Europe, and in India, of a mixed and diversified complexion, adapted to all tastes. Thus this work, whilst, as a periodical vehicle of intellectual amusement, it comes within the category of a magazine, possesses, in addition, a feature of peculiar interest in its summary or chronicle of Asiatic news, which is calculated to attract the curiosity of the public in general, but is of especial and essential importance to every one connected, immediately or remotely, with India, who, in its pages, may watch the welfare and advancement of their relations and friends.

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VII.—ASIATIC INTELLIGENCE.

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LIST OF PLATES IN PART I.

PLATE.

ZOOLOGY.

- | | | | |
|----|-------------------------------|--------------|------------|
| 4. | Lagomys alpinus, <i>Desm.</i> | Alpine hare. | Nat. size. |
|----|-------------------------------|--------------|------------|

BOTANY.

- | | | | |
|-----|-----------------------------|----------------------------|-------------------|
| 11. | { 1. Anemone discolor. | 2. Ranunculus polypetalus. | |
| | { 3. Isopyrum grandiflorum. | 4. 1. microphyllum. | |
| 12. | Delphinium Cashmerianum. | | |
| 13. | Aconitum heterophyllum. | | |
| 14. | Cimicifuga frigida. | | |
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23.	1.	<i>Gossypium herbaceum</i> .
24.	1.	<i>Eurya acuminata</i> .
25.		<i>Cedrela serrata</i> .
26.	1.	<i>Cissus Rosen</i> .
27.		<i>Geranium Lindleyanum</i> .
28.	1.	<i>Impatiens bicolor</i> .
	2.	<i>P. furcata</i> .
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34.	1.	<i>Genista versicolor</i> .
35.	1.	<i>Parochetus communis</i> .
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	2.	<i>Deutzia corymbosa</i> .
	2.	<i>Rhododendron anthopogon</i> .
	2.	<i>Primula elliptica</i> .

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